IN THE

Supreme Court of the United States.

In the Matter of the Application for the Allowance of an Appeal of Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire, in the Case in the Court of Appeals of the District of Columbia, No. 3571, Entitled—

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, APPELLANT,

vs.

JOSEPHINE P. McGOWAN, EXECUTRIX OF JONAS H. McGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE, APPELLEES.

Application for Allowance of Appeal.

NATHANIEL WILSON
AND
J. J. DARLINGTON,
Their Solicitors.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

In the Matter of the Application for the Allowance of an Appeal of Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire, in the Case in the Court of Appeals of the District of Columbia, No. 2371, Entitled—

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, APPELLANT,

vs.

JOSEPHINE P. McGOWAN, EXECUTRIX OF JONAS H. McGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE, APPELLEES.

To the Supreme Court:

Now come the appellees in the above entitled cause, by their solicitors, Nathl. Wilson and J. J. Darlington, and apply for and request the allowance by this Court of the appeal to this Court taken and entered by them in the Court of Appeals of the District of Columbia on the 4th day of January, 1913, from the final judgment of said Court of Appeals entered in said cause on the 4th day of November, 1912, reversing the decree of the Supreme Court of the District of Columbia, with costs, and remanding the cause to said Court with directions to dismiss the appellees' bill of complaint.

They also request that this Court, if the appeal be allowed, fix the penalty of a bond to be given to operate as a supersedeas when approved.

The appellees, petitioners, respectfully state—

That after the entry of the aforesaid final judgment by the Court of Appeals they, the appellees, duly entered a motion for the rehearing and reargument of said cause which was denied by the said Court of Appeals.

That with their appeal from said decree of the Court of Appeals, taken on said 4th day of January, 1913, as aforesaid, was the prayer and petition to said Court of Appeals for the allowance of said appeal to this Court and for the fixing of the penalty of a bond to operate as a supersedeas when approved.

That on the 13th day of January, 1913, the said Court of Appeals announced its refusal to allow said appeal. Whereupon the appellees, petitioners, respectfully make application to this court to allow their said appeal, the application being made direct to the court at the suggestion of the chief justice.

The grounds upon which they base their application are in substance those presented to the Court of Appeals when request was made to that court for allowance by it of their appeal.

By section 250 of the judicial code the right of appeal to the Supreme Court is preserved (subject to the allowance of the appeal by the Court of Appeals or by one of the justices of this Court or by this Court), "in cases in which the construction of any law of the United States is drawn in question by the defendants."

The law of the United States on which the defendant,

in her answer and in her appeal from the decree of the equity court, chiefly based her defense, and on which the Court of Appeals chiefly based its conclusions in reversing the decree of the equity court, is section 3477 of the Revised Statutes, which is a general statute of the United States, and which applies to and forbids *all* assignments and transfers of any interests in claims against the United States.

The construction of the statute and its effect upon contracts and upon the separate provisions or clauses of contracts of a certain kind, proposed and contended for by the defendant and adopted by the Court of Appeals and expressed in its opinion, is a construction of a public statute which affects transactions everywhere and particularly in the District of Columbia, and more particularly all attorneys at law and their clients in the District of Columbia engaged in prosecuting claims against the Government.

There seems to be no good reason to suppose that Congress meant to and did confide to the Court of Appeals of the District of Columbia exclusively the interpretation of such an important law in suits instituted in the District of Columbia, the seat of the Government of the United States.

There has been deposited with the clerk of this Court a duly authenticated transcript of the record of the proceedings in this case in the Court of Appeals up to the dates of its certification December 7, 1912, to which reference is hereby made and there are attached to this application copies of the following documents.

(*a*) The final judgment of the Court of Appeals entered November 4, 1912.

(*b*) The order denying the motion for a rehearing and directing the withholding of the mandate.

(*c*) The appeal taken to this Court, and

(*d*) A copy of the assignment of errors filed in the Court of Appeals.

The opinion of the Court of Appeals is found in the transcript at page 262, and the opinion of the Supreme Court of the District is printed on page 243 of the transcript.

In respect of the penalty of the bond which should be required if the appeal be allowed, it is to be said that the record shows that the decree of the Equity Court which the Court of Appeals reversed is for the sum of $36,271.78, with interest from June 7, 1909, and that there is on deposit with a trust company subject to the decree of the Equity Court the sum of $41,000 which draws interest at the rate of 2 per cent per annum. This deposit was made with the consent of the defendant under a consent interlocutory decree subject to the determination of the Equity Court as to what compensation if any is due the plaintiffs for their professional services.

If the plaintiffs' bill is dismissed the defendant will be entitled to the payment of the money deposited with the accumulated interest. It would be contended that in that event the defendant would not be entitled to recover against the plaintiffs any interest but only

costs; and such is undoubtedly the effect of the judgment from which this appeal is taken.

If the defendant should be held to be entitled to recover interest it would be for the difference between 2 per cent and 6 per cent per annum which is 4 per cent per annum on the sum deposited, $41,000, from the date of the decree of the Court of Appeals, November 4, 1912, to the date of the final decree, which in the event of the allowance of the appeal may not be rendered for two, or perhaps three, years. At the rate of interest specified the appellees would be required to pay as damages $1,640 in respect of each year's interest, or in all not more than $4,920.

The appellees respectfully submit that the penalty of the bond should not be for a greater sum than would be amply sufficient to cover all costs; that is, $1,000 or $1,500.

If it is considered that the penalty of the bond should be determined by the amount of interest that may possibly become payable, then the total amount of interest to be paid would not exceed $4,920.

It is respectfully submitted that the application for the allowance of the appeal should be granted.

JOSEPHINE P. McGOWAN,
Executrix, and
ELIJAH V. BROOKSHIRE,
Petitioners.

By NATHANIEL WILSON
AND
J. J. DARLINGTON,
Their Solicitors.

(a)

[Copy.]

Monday, November 4, A. D. 1912.

Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Appellant, *vs.* Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire.	No. 2371. October Term 1912.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court with direction to dismiss the bill.

Per Mr. CHIEF JUSTICE SHEPARD,

November 4, 1912.

(*b*)

MONDAY, DECEMBER 2, 1912.

On considering the motion for a rehearing in the above entitled cause, it is by the court this day ordered that said motion be, and it is hereby, overruled. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

(c)

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Emily E. Parish, Executrix of Joseph, W. Parish, Deceased, Appellant,
vs.
Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire.

No. 2371. October Term. 1912.

Now come the appellees in the above entitled cause, by their counsel, and appeal to the Supreme Court of the United States from the judgment entered by this Court in this cause on the 4th day of November, 1912, and pray that the same may be allowed and that the court will fix and designate the penalty of the bond to be filed by the said appellees to operate as a supersedeas in respect of said judgment and further proceedings thereon.

Dated, January 4th, 1913.

NATHL. WILSON,
J. J. DARLINGTON,
Counsel for Appellees.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Appellant,
vs.
Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire.

No. 2371. October Term, 1912.

Now comes the appellees in the above entitled cause and having appealed to the Supreme Court of the United States from the judgment entered in this cause on the 4th day of November, 1912, and having asked that the

appeal be allowed, state that the grounds of their appeal and their reasons for asking that their appeal be allowed are that in this case the construction of a law of the United States is drawn in question by the defendant, that is to say, the construction, applicability and effect of section 3477 of the Revised Statutes of the United States relating to the assignment of claims against the United States, a federal statute of general application, are drawn in question by the answer of the defendant and have been considered and determined in and by the opinion of this court as that opinion is reported in the Washington Law Reporter, Vol. No. and that under the provisions of section 250 of the Judicial Code, a final judgment of this Court, may be re-examined and affirmed, revised or modified by the Supreme Court of the United States upon appeal, and that the appellees have therefore the right of appeal from said judgment to the Supreme Court.

NATHL. WILSON,
J. J. DARLINGTON,
Of Counsel for Appellees.

(*d*)

IN THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

Emily E. Parish, Executrix of J. W. Parish, Deceased, Appellant, *vs.* Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire.	No. 2371. October Term 1912.

Assignment of Errors on Appeal to the Supreme Court of the United States.

Now come the appellees in the above entitled cause, Josephine P. McGowan, executrix of Jonas H. McGowan, and Elijah V. Brookshire, appellants in the appeal taken herein by their solicitors, and respectfully show and allege that the final decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause November 4, 1912, reversing the final decision of the Supreme Court of the District of Columbia rendered in this cause on the 19th of October, 1911, was and is erroneous and against the just rights of the appellants, and they file herewith their assignments of error, on which they will rely in the prosecution of their appeal from the decree of this Honorable Court of November 4, 1912, reversing the decree of the Supreme Court of the District of Columbia and directing the dismissal of the plaintiff's bill of complaint in this cause, and they, the appellants, assign the following errors:

1. The Court of Appeals erred in adjudging and decreeing that the decision of the Supreme Court of the District of Columbia of October 19, 1911, be reversed, and directing the said court to dismiss the bill of complaint.

2. That the Court erred in refusing to affirm said decree of said court.

3. The Court erred in holding that section 3477 of the Revised Statutes of the United States had any application to the rights adjudicated by the decree from which the appeal was taken.

4. The Court erred in holding that section 3477 of the Revised Statutes made void or unenforceable the contracts set out in the bill of complaint of the plaintiffs McGowan and Brookshire with Parish.

5. The Court erred in holding that section 3477 of the Revised Statutes made void those provisions of the said contracts which fixed the amount of compensation to be paid plaintiffs for their professional services.

6. The Court erred in holding, on the one hand, that said contracts were invalid, and not binding the defendant's testator, Parish, because prohibited by section 3477 of the Revised Statutes, and yet were valid and enforceable as to the plaintiffs McGowan and Brookshire.

7. The Court erred in holding that under the contracts of the plaintiffs with Parish their client, Parish, the defendant's testator, could dispense with the services of McGowan and Brookshire without cause, and thereby defeat their rights to the compensation specified in their contracts, and relegate them to a recovery upon a *quantum meruit* for the services performed before their services were dispensed with.

8. The Court erred in holding that the consent decree converted the suit into one upon a *quantum meruit* so as to require an amendment to the bill of complaint

and prevent the granting of any relief without the amendment.

9. The Court erred in holding that the contracts of the plaintiffs do not fix the measure of their recovery.

10. The Court erred in holding that inquiry into the question of jurisdiction of equity as distinguished from jurisdiction at law was proper on this appeal from the decree of October 19, 1911, inasmuch as the decree of June 2, 1909, which was entered by consent and from which no appeal was or could be taken, necessarily adjudicated whatever such jurisdictional questions were involved.

11. The Court erred in holding that the statutory proceeding in the Probate Court of the District of Columbia constituted an adequate remedy which negatived the jurisdiction of equity to entertain a bill of complaint to protect creditors under the circumstances set out in this bill.

12. The Court erred in holding that the plaintiffs had no attorney's lien or equitable right in the proceeds of the Parish claim.

13. The Court erred in holding that, despite the findings of fact made by the trial court, a letter written by the client, Parish, the defendant's testator, to one of the plaintiffs, his attorney, McGowan, and McGowan's consent that he, Parish, might raise money on his claim, despite McGowan's attorneyship, and McGowan's alleged statement, "I don't care who collects it, I want my fee out of it," constituted proof of abandonment of the claim and defeated a recovery of even the reasonable value of services theretofore rendered.

14. The Court erred in holding that the plaintiff Brookshire, who, the Court holds, was probably not aware of McGowan's actions, was bound by his actions, and was thereby likewise deprived of all rights of recovery.

15. The Court erred in holding that, despite the findings of fact made by the trial court, the burden of proof was upon the plaintiffs to show that they had made known their willingness to proceed with the claim, and that there was no evidence of this.

16. The Court erred in re-examining the facts of the case without considering the testimony of the plaintiff Brookshire as to statements made to him by the deceased, Parish, as to which statements, as appears by the record, notice of objection was made before the examiner who took the testimony, but the objection was not made or renewed when the testimony was presented to the Court at the hearing.

NATHL. WILSON,
J. J. DARLINGTON,
Solicitors for the Appellees, McGowan and Brookshire.

(Endorsed:) No. 2371. Emily E. Parish, Executrix of J. W. Parish, Deceased, Appellant, *vs.* Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jan. 11, 1913. Henry W. Hodges, Clerk.

A true copy. Test:

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals,
of the District of Columbia.

IN THE

Supreme Court of the United States.

JOSEPHINE P. McGOWAN, EXECUTRIX OF JONAS H. McGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE,

vs.

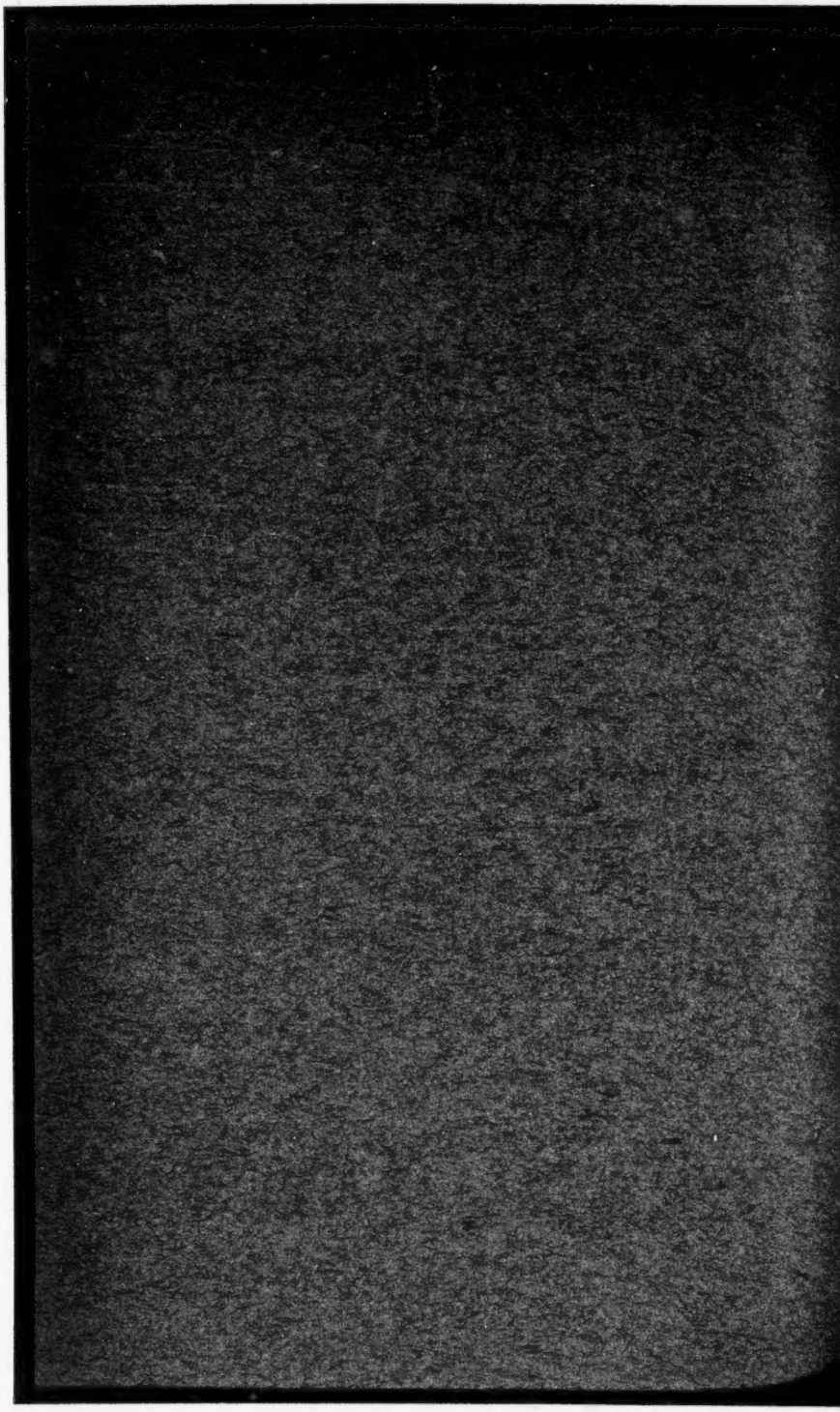
EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED.

APPLICATION FOR THE ALLOWANCE OF AN APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief on Behalf of Applicants and Appendix Containing Opinions of Courts Below.

NATHL. WILSON,
J. J. DARLINGTON,
Of Counsel for Applicants.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

JOSEPHINE P. McGOWAN, EXECUTRIX OF JONAS H. McGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE,

vs.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED.

APPLICATION FOR THE ALLOWANCE OF AN APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPLICANTS.

This is a brief in support of an application for the allowance of an appeal from the Court of Appeals of the District of Columbia, under the new Judicial Code, the act of March 3, 1911, chapter 10, section 250.

The appeal was duly noted in the Court of Appeals on the 4th of January, 1913, and it was, on January 13, 1913, by that court denied.

On the same day, by reference of the Chief Justice, application for allowance was made to this Court. Later in the same day a memorandum stating the reasons for refusing to allow the appeal was filed by the

Court of Appeals with its clerk, of which a copy is printed in the Appendix hereto.

The statute relied upon by applicants reads:

> Sec. 250. Any final judgment or decree of the Court of Appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases: . . .
>
> Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

The applicants claim that this is a case wherein the construction of a law of the United States is drawn in question by the defendant.

The law of which the construction is drawn in question by the defendant is section 3477 of the Revised Statutes of the United States, which reads:

> Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed . . . after the allowance . . . and the issuing of a warrant for the payment thereof.

This is a public statute having general application throughout the United States. Its provisions, with few changes, have been in force for more than fifty years, and have been contained in and are a part of

that body of general and public laws designated as the "Statutes at Large."

It is not in any sense a local statute, nor operative in any special or restricted way in the District of Columbia.

Its administration and enforcement are matters of more frequent consideration and greater importance in the District of Columbia than elsewhere, because the District of Columbia is the seat of government and of supreme judicial authority and the place where, in the actual conduct of the public business, claims against the Government are in great part prosecuted, adjudicated and paid, and where the disposition and distribution of the proceeds of claims that are paid become a part of the public business.

The broad difference and distinction between the statute in question and special acts of Congress applicable exclusively to the District of Columbia were plainly recognized in the case of American Security and Trust Company *et al. vs.* Commissioners, etc., 224 U. S., 491, recently decided by this Court, in which the Court said:

> "In the case at bar if the words 'construction of any law of the United States' are confined to the construction of laws having general application throughout the United States the jurisdiction given to this Court by section 250 is confined to what naturally and properly belongs to it."

It is to be noticed that the Judicial Code, while it diminished the appellate jurisdiction of this Court as to the Court of Appeals of the District of Columbia, yet ex-

pressly saved and preserved a broader jurisdiction than that provided as to other courts from which appeals may be taken.

From the District Courts of the United States appeals are not authorized where merely the *construction* of a law is drawn into question. The corresponding provision is:

> Sec. 238. . . . "in any case in which the *constitutionality* of any law of the United States, or the validity or *construction* of any *treaty* made under its authority is drawn into question."

From the Supreme and District Courts of Porto Rico, appeals may be taken—

> Sec. 244. . . . "in any case . . . wherein the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and *the right claimed thereunder is denied.*"

From the Supreme Courts of Arizona and New Mexico appeals may be taken:

> Sec. 245. . . . "in any case . . . in which is drawn in question the *validity* of a treaty or statute."

From the District Court of Alaska:

> Sec. 247. . . . "in all cases . . . in which the *constitutionality* of any law of the United States or the validity or *construction* of any *treaty* made under its authority is drawn in question."

When contrasted with these provisions, it becomes apparent that Congress used expressions to preserve

jurisdiction of appeals in cases arising in the District of Columbia wherein merely the *construction*, not the *validity* or *constitutionality*, is drawn in question, whether the *construction* adopted by the inferior court resulted in the grant or denial of the right claimed under the statute.

It is apparent, also, that the validity of a law or the constitutionality of a law may not be said to be drawn in question when that validity is merely asserted. *Validity* and *constitutionality* are words of affirmation which must be negatived or denied in order that there be a question. *Construction*, however, is not such a word. It denotes merely the ascertainment of the true meaning of the thing construed, and *construction* of a law is in question wherever the true meaning of the law is differently conceived by litigants and is sought for by the court.

As used in the Judicial Code, the *construction* of a law is in question when one party claims that the law should be construed to effect one result in the pending litigation, and the other party claims that that law should be construed differently to effect a different result in the pending litigation, and where the courts having jurisdiction of the action have determined the respective rights of the parties, in whole or in part, by a determination of the issue thus presented.

If such issue is raised by the act of the defendant, then it is submitted, the construction is drawn in question by the defendant.

In this case the contention made by the defendant in her answer was that the contracts set up in the bill

of complaint were absolutely void and wholly inoperative by reason of the provisions of section 3477, Revised Statutes, relating to the assignment and transfer of claims against the United States.

The bill of complaint in this case was filed by Jonas H. McGowan (now deceased) and Elijah V. Brookshire, attorneys practicing in the District of Columbia, in order to collect their agreed fee for professional services rendered to Joseph W. Parish in the Parish ice claim, which was finally adjudicated by this Court in Parish *vs.* MacVeagh, 214 U. S., 124. A lien was claimed by plaintiffs on the proceeds of the claim based upon the express terms of their contracts, and based also upon the rendition of professional services in the recovery of those proceeds, and they availed themselves of the speedy preventative writs of equity because of the necessities of their case in respects not material here. They claimed that they were entitled to be ultimately paid the compensation specified in their contracts.

A consent decree was thereupon entered by the trial court whereby $41,000 of the proceeds were deposited "to the credit of this cause and subject to the further order of this court herein and subject to the determination by this court in this cause whether any amount and, if so, what amount is justly due the complainants, or either of them, for professional services rendered by them or either of them, for and in respect of the matters described in the bill of complaint" (Transcript, p. 13).

The answer of the defendant, Parish's executrix, was in part as follows:

> "This defendant is advised, insists, and so charges, that by the provision in said alleged con-

tract between said Parish and said McGowan whereby in advance of any allowance of the claim of said Parish, there is assigned to said McGowan 'power to receipt for any draft, or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated;' an agreement was sought to be made which is in violation of section 3477 of the Revised Statutes of the United States; and which by said statute is declared to be null and void. She is advised and insists that the same is true of the alleged contract of said Parish with said Brookshire, whereby it is provided 'that said Brookshire shall have a lien for the amount due him upon the amount of said award, when the same is made.' The alleged contract between said McGowan and said Brookshire is the assertion by the said McGowan, not only of an assignment already made to himself of an interest in a claim against the Government, but of a transfer so absolute as to vest in him the power to assign a portion of that interest to another, before any claim whatever had been allowed. This defendant is advised and insists and so charges, that nothing could be more plainly null and void under said section 3477, than a contract which sought such absolute dominion over a claim against the Government. But were the same valid, it would be a claim against said McGowan (Transcript, p. 16).

. . . . . .

"Further answering this defendant says; that by the said alleged contract of August 4th, 1900, between said Joseph W. Parish and said J. H. McGowan it is expressly stipulated and provided,

that 'the party of the second part (said McGowan) agrees to diligently prosecute said claim to the best of his professional ability to its final determination.' This defendant is advised and insists and so charges, that the consideration for the alleged agreement on the part of Parish was the promise by McGowan to prosecute said claim 'to its final determination.' This defendant is advised and insists, and so charges, that there was a breach of contract as to this by the said McGowan" (Transcript, p. 21).

In brief, the defendant claimed that section 3477, Revised Statutes, that is, defendant's interpretation of this section, made void the plaintiffs' contracts, so that they were the basis of no rights in the complainants, either to the protection of the lien attempted to be provided by them, or to have their services compensated at the rate or by a payment of the amount specified in their contracts; yet that, despite the statute, these contracts remained valid and binding upon McGowan and Brookshire, and bound them to prosecute to a final determination, in (alleged) failure of which, they are without remedy, even upon a *quantum meruit.*

On this answer issue was joined.

The trial court followed the construction of the statute given by this Court in the case of Price *vs.* Forrest, 173 U. S., 410, and held that the statute was not intended to apply and did not apply to a case such as this, arising between the principal parties to the assignment, the Government having no longer any

interest in the controversy. Its further holding is tersely summarized in the concluding paragraph of its opinion:

> "It was perfectly competent for the parties to these contracts to stipulate in advance for the exact amount of the compensation to be paid and received, and that they did. The contract having been performed on the part of the plaintiffs so far as they were permitted to perform it, we see no reason why they should not receive the amount agreed upon. Nutt *vs.* Knut, 200 U. S., 12."

The defendant appealed, and the Court of Appeals held that no lien could be claimed by the plaintiffs on the proceeds of the claim, because these provisions of the plaintiffs' contracts were made void. Therefore, the court held, there was no basis for equity jurisdiction, except the assumption of jurisdiction by the consent decree, under which the suit might have been amended so as to set up a claim upon a *quantum meruit*. It was held that the provisions of the contracts of plaintiffs could not, therefore, serve as an agreed basis of compensation, and the case of Nutt *vs.* Knut, 200 U. S., 12, in which the contrary conclusion was reached, was distinguished.

Further, in deciding not to remand the case for a *quantum meruit* inquiry, the court held that the plaintiffs had not complied with the terms of these contracts (which were void, the court had held), and were thereby cut off from a recovery of the reasonable value of their services. The Court of Appeals seems to have held the proper construction of section 3477 to be that it

invalidated the plaintiffs' contracts in so far as they were relied on by the plaintiffs and left them binding so far as they were relied on by the defendant.

On the face of the record it appears that the construction or the true meaning of a law of the United States has been a matter of controversy between the plaintiffs and the defendant from the time it was drawn in question by the answer of the defendant.

Reply to Objections Made to Allowance of Appeal.

In the Court of Appeals counsel for the respondent filed a brief in which they assert that the construction of section 3477 was not drawn into question, because they, "*without a suggestion that there can be any difference of opinion on the subject,*" invoked a law of the United States. "The Statute, indeed, is expressed in such plain, unambiguous terms that no room is left for construction."

Yet this Court has distinctly held as to this statute (section 3477, R. S.), that "these cases show that the statutes in question are not to be interpreted according to a literal acceptation of the words used."

Bailey *vs.* United States, 109 U. S., 432, 438.

The Court of Appeals, nevertheless, in the opinion denying an appeal, indicates its agreement with the contention of respondent. It says:

> "The right to appeal is one of substance and not of mere form. The question of the validity of the lien is one that has been settled by the Supreme Court of the United States in construing section 3477 and was no longer an open one.

> The construction of the act could not, therefore, be drawn into question. State of Kansas *vs.* Bradley, 26 Federal, 289; Harris *vs.* Rosenberger, 145 Federal, 449-452."

Two answers are to be made to this statement only.

First. Not the lien claimed by the plaintiffs, but the right to any recovery on their contracts, is denied by the Court of Appeals as a consequence of its construction of section 3477. That court relegates the plaintiffs to a *quantum meruit* recovery by holding their contracts void, and by holding that the only basis of jurisdiction was the consent decree which, it holds, warranted only a *quantum meruit* recovery, and then it sweeps away the possibility of a *quantum meruit* recovery by a finding (contrary to the facts found by the trial court) that the plaintiffs violated the very contracts which are elsewhere in the opinion held void because in conflict with section 3477.

Second. The validity of the lien or equitable right of plaintiffs under section 3477, under the circumstances under which it was asserted, is a question not set at rest by any decision of this Court. To argue this fully would be to discuss the case upon the merits, but it is submitted that it is sufficient for the present purpose to show that the issue or question of the construction of the statute is real, not feigned. This is shown by the fact that the trial court, relying mainly on Price *vs.* Forrest, *supra* (where this Court said of this section, "There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors"), held section 3477 no bar to the

assertion of plaintiffs' claim and that the plaintiffs were entitled to the relief they prayed. And the Court of Appeals, relying mainly upon Bank *vs.* Downie, 218 U. S., 245, and taking the view that section 3477 was a bar to the recognition of plaintiffs' rights, denied them all relief and directed the final dismissal of their bill.

The cases cited by the Court of Appeals in denying an appeal (State of Kansas *vs.* Bradley, 26 Federal, 289; and Harris *vs.* Rosenberger, 145 Federal, 449) were cases in which the jurisdictional controversy was obviously without merit, and was held frivolous and feigned.

The question as to the true construction of section 3477 is one of great importance, not alone in the District of Columbia, but in all of the United States. Everywhere attorneys are being engaged to collect claims against the United States, usually for compensation contingent upon success, and for which they must look to the fund recovered. What rights are given by contracts which attempt to secure the payment of such compensation, and what remedies are available to such attorneys or to any persons who are interested in the proceeds of claims, are questions of great importance, and are dependent, in part at least, upon a correct construction of section 3477. Such cases frequently arise in the State courts, as did Price *vs.* Forrest, *supra*, a New Jersey case.

There are printed herewith for convenience of reference:

The opinion of the Court of Appeals directing the dismissal of the bill of complaint.

The opinion of the Court of Appeals refusing to allow the appeal.

The opinion of the Supreme Court of the District of Columbia granting to the plaintiffs the relief prayed for.

NATHL. WILSON,
J. J. DARLINGTON,
Of Counsel for Applicants.

Opinion Dismissing Bill Filed November 4, 1912.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, APPELLANT,

vs.

JOSEPHINE P. MCGOWAN, EXECUTRIX OF JONAS H. MCGOWAN, DECEASED, AND ELIJAH V. BROOKSHIRE.

CLAIMS AGAINST UNITED STATES; ATTORNEY AND CLIENT; LIENS; CONTINGENT FEES; QUANTUM MERUIT; EQUITY JURISDICTION.

1. A contract between attorney and client for the prosecution of a claim against the United States to final determination for stipulated fees equal to a certain per centum of the amount collected and with an express lien to secure payment of the same, is prohibited by sec. 3477 R. S. and thereby made absolutely void.
2. Contracts for contingent fees are not illegal, and an attorney prosecuting a cause under such a contract has a lien on the judgment recovered by him therein as well as upon collections made by him thereunder; but the lien does not extend to a judgment recovered by other and independent attorneys without his cooperation.
3. A client may dispense with the services of an attorney at any stage of the proceedings, but can not thereby defeat his right to recover the reasonable value of services theretofore performed.
4. Where the services of attorneys employed to prosecute a claim against the Government were dispensed with and other attorneys employed who, under a contract for a liberal fee instituted proceedings which resulted in the payment of the claim, the first attorneys employed were not entitled to a lien on the judgment for the reasonable value of their services.
5. Equity is without jurisdiction of a suit by attorneys, not entitled to a lien, to recover the reasonable

value of services rendered by them; but certain recitals in an interlocutory decree and the answer of defendant in the present case held to amount to a waiver of the question of jurisdiction justifying the appellate court in retaining the case for a hearing upon the merits.

6. The evidence in the present case held to fail to show that plaintiffs had performed their contract for the prosecution of the claim to judgment so far as permitted by the claimant and his executrix, or had indicated their readiness or willingness to continue its prosecution to final determination, and a decree in their favor for a percentage of the sum finally recovered through the efforts of other attorneys, reversed.

No. 2371. Decided November 4, 1912.

APPEAL by defendant from a decree of the Supreme Court of the District of Columbia, in Equity, No. 28,561, in a suit to enforce a lien on a fund realized from a claim against the United States. Reversed and dismissed.

Mr. HOLMES CONRAD and Mr. LEIGH ROBINSON for the appellants.

Mr. NATHANIEL WILSON and Mr. J. J. DARLINGTON for the appellees.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is a suit in equity begun May 22, 1909, by Jonas H. McGowan and Elijah V. Brookshire against Emily E. Parish, executrix of Joseph W. Parish, deceased, Franklin MacVeagh, Secretary of the Treasury, and Charles H. Treat, Treasurer of the United States, to recover part of a fund realized on a claim of said Parish against the United States.

The bill alleges that on August 4, 1900, and for a long time prior thereto, Joseph W. Parish, had and had asserted a claim against the United States for a large sum of money alleged to be due by virtue of a contract for the delivery of ice. That he entered into a contract

with the complainant, Jonas H. McGowan, for the prosecution of said claim. Said contract set out in the bill recites the employment of McGowan by Parish to prosecute his claim for ice furnished the Army under contract with the United States, during the late war; and further that in consideration of the professional services rendered and to be rendered by McGowan and others whom he may employ in the prosecution of said claim, he agrees and hereby binds himself, his heirs and legal representatives to pay to said McGowan, his heirs and legal representatives, a fee equal in amount to fifteen per centum of whatever sum of money or other indebtedness may be awarded or collected on account of said claim. It is likewise agreed that McGowan shall have control of said prosecution to its final determination with power to receive and receipt for any draft or other evidence of indebtedness, which may be issued in payment thereof, and to retain from the proceeds of the same the amount of the fee herein stipulated.

Parish further agreed to furnish all the evidence and papers that may be required in the prosecution of said claim and to execute and deliver to the party of the second part such powers of attorney, or other papers as will be necessary for the prosecution and collection of said claim and the payment of said fee. It is further agreed that in no event shall said Parish assign, transfer, or otherwise dispose of said claim or any part thereof, and this agreement shall not be affected in any particular by any revocation of the authority granted, or which may be granted to McGowan, nor by any services rendered, or which may be rendered, by others, or by Parish, his heirs, or legal representatives. McGowan agrees to diligently prosecute said claim to the best of his professional ability to its final determination. This contract was executed by both parties on August 4, 1900.

The bill further alleges that McGowan was a lawyer

engaged in the practice of law in the District of Columbia, practicing largely before the Court of Claims and the executive departments. That for a long time prior to said last mentioned date said McGowan had rendered professional services as a lawyer to the said Parish in the preparation and prosecution of said claim. That after said contract was entered into McGowan continued diligently to render his professional services in the prosecution of said claim before the Congress of the United States and various committees thereof. That on December 3, 1902, McGowan and the said Parish being desirous of securing the services of said complainant, Elijah V. Brookshire, as a lawyer in the prosecution of said claim in cooperation with the said McGowan, the latter executed an assignment to said Brookshire whereby in consideration of five dollars and other valuable considerations, he assigned, sold and transferred and set over to said Brookshire, the undivided one-third interest in the contract made between Parish and himself, bearing date August 4, 1900. It was the intention of this assignment to convey to said Brookshire 5 per cent, or one-third of whatever money might be paid to McGowan under said contract. It was further understood that this agreement would terminate with services in the present Congress, provided the bill does not pass, but in case it does pass and become a law, will then terminate with the action of the Secretary of War, and the final determination of said claim for ice by the executive and disbursing officers of the Government.

It further alleges that on the 20th day of January, 1903, the said Parish and complainant Brookshire entered into an agreement in writing, which was duly executed by both parties. This agreement recites that for value received and fo. legal services hereafter rendered and to be rendered in the prosecution of said claim, said

Parish agrees to pay said Brookshire a sum equal to 5 per cent of the amount awarded or appropriated for said claim. This contract to be an order upon the proper officers of the Government, or any one authorized to disburse said award so appropriated, and it is expressly understood that the said Brookshire shall have a lien for the amount due upon the amount of said award when same is made. Said Brookshire agreed to render the necessary legal services in the prosecution of the above-described claim under the direction of said Joseph W. Parish.

It is further alleged that pursuant to the employment above mentioned, and the agreements hereinbefore set forth, the said complainants diligently prosecuted the said claim and rendered valuable legal and professional services in respect thereto and in preparing and making arguments before the proper committees in Congress, in collecting evidence and in filing and presenting to said committees petitions, briefs, and arguments in their efforts to obtain an act of Congress for the relief of said Parish and providing for the settlement of said claim. Thereafter, Congress passed an act providing for the referring of the claim of said Parish to the Secretary of the Treasury for examination and payment of any balance due him, which was approved February 17, 1903. 32 Stat., 1612-1613.

Immediately after the passage of the act, which was drafted by the said McGowan, and which was advocated and urged in all proper ways before the several committees of the House and Senate, the Secretary of the Treasury, referred to the proper officer of the Government, namely, the Auditor for the War Department, the claims of said Parish, and the papers relating thereto. Complainants appeared before the Auditor and rendered valuable professional services, and filed briefs and arguments in behalf of the said claim. That on or about the

11th day of August, 1903, the said Auditor made a finding and declared that there was a balance due to said Joseph W. Parish of $181,358.95. That on receiving the said finding and award from the said Auditor, the said Secretary of the Treasury referred the same to the Comptroller of the Treasury for examination and report. The complainants appeared before the said Comptroller and submitted to him elaborate arguments. The Comptroller returned said papers with an adverse report to the Secretary of the Treasury, and thereupon further consideration was given to the said award by the Secretary of the Treasury, and the same was then referred to the Solicitor of the Treasury, before whom the complainants appeared and made further arguments. The Solicitor of the Treasury returned the said claim to the Secretary of the Treasury with an opinion adverse to the payment of the same. Thereupon the Secretary of the Treasury, at that time Leslie M. Shaw, again considered the said claim and the same was again argued before him by the complainants at great length. That on May 31, 1904, the Secretary of the Treasury declined and refused to pay any balance whatsoever, and made his final decision to that effect.

That after this decision the complainants advised with said Parish in respect to the steps necessary and proper to enforce payment of said award, and to obtain payment of the claim, and had especially under advisement and consideration the propriety of filing in the Supreme Court of the District of Columbia a petition for the writ of mandamus to compel the Secretary to issue a draft in favor of said Parish for the balance found to be due by the Auditor, and were still considering and still had under advisement the filing of a petition for a writ of mandamus, and were awaiting the return of the said Parish to the District of Columbia, from which he had been absent for some time, until the time of his death,

which occurred in the city of Washington on December 26, 1904.

That for a long time prior to the death of the said Joseph W. Parish he and his family had been in necessitous circumstances and in order to relieve their pressing wants, the complainants had from time to time advanced to him for the benefit of himself and family various sums of money amounting in the aggregate to the sum of $5,000, relying solely upon his promise to repay the sums so loaned out of what might be recovered in respect of said claim. That after the death of said Parish on April 30, 1905, the will of the said Joseph W. Parish was presented in the Probate Court of the District of Columbia by the defendant, Emily E. Parish, daughter of said Joseph W. Parish, who was named in the said will as his executrix. On April 7, 1905, the will was admitted to probate and letters testamentary were issued to the said executrix and a bond approved by the court for the sum of $500.

That it was stated to the Probate Court that the estate of said Parish consisted of his claim against the United States and his wearing apparel. That since the probate of said will claims against the estate have been presented by different persons amounting in all to about $23,000.

That after the death of the said Parish and the probate of said will, the executrix disregarding the rights of these complainants and their interests in the subject-matter, of the claim of said Joseph W. Parish and the services rendered by these complainants, and well knowing that the complainants were ready and willing to renser their services in the further prosecution of said claim, employed other counsel, without consulting with or advising complainants, for the further prosecution and collection of said claim, and on May 2, 1906, said executrix by said attorneys filed in the Supreme Court of the

District of Columbia her petition for writ of mandamus to the Secretary of the Treasury requiring him to issue a draft in favor of said Emily E. Parish for the sum of $181,358.95, basing her petition solely on the ground that "every condition precedent to payment to said Joseph W. Parish in accordance with the act of February 17, 1903, had been satisfied by the examination made by the Auditor for the War Department, and that therefore there remained only the ministerial duty on the part of the Secretary of the Treasury to pay the amount allowed by the Auditor." Said petition was dismissed by judgment of the Supreme Court of the District; that judgment was appealed to the Court of Appeals of the District of Columbia, and by its judgment entered the 4th day of June, 1907, the said court affirmed the said judgment of the Supreme Court of the District; that an appeal was taken to the Supreme Court of the United States, and on May 17, 1909, that court reversed the judgment of the courts below, and directed that the writ of mandamus issue as prayed. That complainants are informed and believe that the mandate of the Supreme Court will forthwith be sent down and that the said writ of mandamus will be immediately issued to the Secretary of the Treasury commanding him to issue a draft in favor of Emily E. Parish, executrix, for the sum of $181,358.95. That complainants are further informed and believe that it is the expressly declared intention of the said executrix to ignore and refuse to recognize the lien and claim of your complainants in and to the said fund, created and established in and by the contracts and agreements hereinbefore mentioned and set forth, and by the valuable and indispensable service of your complainants rendered in the prosecution of said claim, but on the contrary the said executrix and her brother, Grant Parish, had avowed and declared that they, the said complainants, shall never receive a cent of said

money. That the said estate of Joseph W. Parish is insolvent, and that complainants believe that Emily E. Parish and Grant Parish are insolvent, and if they receive into their hands the draft or the proceeds of the draft about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of this court for the purpose of defrauding and defeating complainants of their rightful lien and claim on the said fund.

That by reason of the premises and the professional services so severally rendered by the complainants and each of them as aforesaid, and by reason of the agreements, the complainants severally became and are the equitable owners of the tenth part or ten per cent of the award, and are entitled to have paid to each of them and to receive one-tenth part of the amount of said award; and each one is entitled to receive, demand and receipt for the one-tenth part or portion of any and all moneys that are or shall be paid in respect thereto.

The prayers are, first: that the court will determine and decree that each of the said complainants are entitled to 10 per cent of said award, and that they are each the equitable owners of 10 per cent of said amount.

Second: That the defendant, Emily Parish, executrix, may be enjoined from applying and receiving from the Government of the United States, or any officer thereof, any draft, check, order, or warrant for the payment of the said award, and from receiving the one-tenth part of said award belonging to said complainant McGowan, and the one-tenth part belonging to said complainant Brookshire.

Third: That the Secretary of the Treasury of the United States, the Treasurer of the United States and their successors be enjoined from issuing any draft, check, warrant, or order to the said executrix, her assigns, or attorneys, in payment of said award or finding.

Fourth: That a receiver may be appointed by this court with authority to demand and receive from the Secretary of the Treasury, or the Treasurer of the United States, the payment of the said award in full and hold the same subject to the further order of this court.

Fifth: That the defendant executrix, her attorneys, agents, and representatives be enjoined from applying for, or demanding from the Secretary of the Treasury, any draft or order for said amount, or from applying for any amount from the said officers equal to one-tenth part of said award, belonging to and claimed by the complainants respectively; and for general relief.

On the same day that the bill was filed, namely, on May 22, 1909, a restraining order was granted enjoining the Secretary of the Treasury from issuing the draft aforesaid to the said executrix. On June 2, 1909, before answer was filed, an interlocutory decree was entered by consent. First dissolving the order and dismissing the bill as to the Secretary of the Treasury, and the Treasurer of the United States, and further that said restraining order is dissolved, as to said executrix; provided, however, that on receipt of the sum of $41,000 and in respect of any warrant, draft, or check that may be issued therefor by the Treasury Department, or any officer thereof, as being a part of the award or finding for the sum of $181,358.95; the said executrix is enjoined from receiving the said $41,000 and is required and directed to make the proper power of attorney, authorizing and empowering Corcoran Thom, Vice-President of the American Security and Trust Company, to receive any warrant, draft or check for her as executrix, and to collect the proceeds thereof and deposit the same when received with the American Security and Trust Company subject to the further order of this court and to the determination by this court whether any amount,

and if so what amount, is justly due the complainants, or either of them, for professional services, in respect of the matters described in the bill of complaint. Said American Security and Trust Company shall hold the said sum of $41,000 so deposited with it and shall pay interest thereon at the rate of 2 per cent per annum; said sum with the accrued interest thereon to be subject to the order and decree of this court in this cause.

On August 2, 1909, the death of the complainant McGowan having been suggested, his executrix, Josephine P. McGowan, was substituted as a party complainant in his stead.

The answer of defendant, filed September 29, 1909, alleges that defendant had no personal knowledge of the several agreements set out in the bill; that she had no knowledge to what extent complainants rendered professional services to said Parish and calls for strict proof of same. That the agreements aforesaid were in violation of section 3477 of the Revised Statutes, therefore null and void.

This defendant, has, however, joined in the consent for a decree in this cause, whereby the sum of $41,000 was directed to be deposited to the American Security and Trust Company to the credit of this cause subject to the determination of the court in this cause, whether any amount, and if so what amount, is justly due complainants, or either of them, for professional services rendered for and in respect of the matters described in the bill of complaint.

This defendant is advised that the utmost which either complainant could claim for legal services would depend upon their reasonable value, and the reasonable value would depend upon what legal services, if any, were rendered. In directing attention to the inhibition interposed by section 3477, to the relief prayed for in the bill, to wit, that the court decree that the said

McGowan has an equitable lien on said finding and award, and on the moneys made payable thereby to the amount of $18,135.89, and that the complainant Brookshire has an equitable lien on said finding and award and moneys payable to the amount of $18,135.89, the object of defendant is not to secure the transfer to another forum of any valid contention, which it is in the power of complainants to make under their alleged contracts, but simply to exhibit, as her duty requires, the limitations imposed by law thereon, in whatever forum the same may be adjudicated.

She admits that Congress passed the act set out in the bill, but can not admit or deny whether complainants did advocate and urge the same in all proper ways before the several committees of the House and Senate, and before the Auditor of the War Department and calls for strict proof thereof. She denies that after the decision made and declared by the Secretary of the Treasury the complainant advised with the said Parish in respect to the steps necessary and proper to be taken to enforce payment of said award, and had especially under advisement and consideration the propriety of filing a petition for the writ of mandamus in the Supreme Court of the District of Columbia to compel the Secretary of the Treasury to pay the same, and they were still considering and still had under advisement the filing of the said writ and were awaiting the return of said Joseph W. Parish to the District of Columbia, from which he had been absent for some time, until the time of his death, which occurred on December 26, 1904. This defendant denies each and all of these allegations. She further avers that never once did the complainant approach her, after her father's death and after her qualification as executrix, in respect of the steps necessary to be taken to enforce payment of said award. In the long interval between the refusal by the Secretary to pay and the

filing of the suit in mandamus, the suggestion of mandamus as the remedy came to her for the first time from the counsel who filed the said mandamus in her behalf. From no others did she ever hear of that remedy. Defendant says that by their action, said complainants, after the refusal of the Secretary, abandoned all prosecution of the claim of her testator against the United States and sought not by any word to correct that which their action or non-action conveyed.

The defendant has no knowledge of the loan of $5,000, and therefore calls for strict proof. That if the said indebtedness did exist it was a simple contract indebtedness and was payable out of the general assets of the estate; and like any other simple contract obligation was barred by the Statute of Limitations. She pleads the Statute of Limitations in bar thereof.

Defendant denies that after the death of the said Parish she disregarded the rights of said complainants, and denies that complainants were ready and willing to render their services in the further prosecution of said claim. She alleges that from May 31, 1904, when payment was refused, to the 2nd of May, 1906, when her mandamus suit was filed, the complainants did not ever impart to this defendant their readiness or willingness to institute a mandamus suit, or any other suit for the enforcement of her rights. On information and belief, she avers that at least one of the complainants did repeatedly assert that the remedy by mandamus was inapplicable and could not be maintained.

It is true tht Emily E. Parish did employ counsel and attorneys without consulting or advising complainants for the further prosecution of the claim. She denies that everything needed to gain the case had been accomplished by the act of February 17, 1903, aided by the finding of the Auditor of the War Department,

because same had been cancelled by the decision of the Secretary of the Treasury.

She denies that it is the intention of herself, her agents, or attorneys to ignore and refuse to recognize any valid claims against the estate of her testator, and denies that none of the claims filed and proved in the Probate Court have been paid in part, but on the contrary avers that all such claims have been paid and satisfied, and in consequence her account passed and approved. She denies that she or her brother are insolvent.

She further alleges that by the terms of the contract with said McGowan he agreed to diligently prosecute said claim to its final termination. She alleges that there was a breach of contract as to this by the said McGowan, and that the determination was one which failed, and it was left to others, having no connection with him, to prosecute said claim to a termination that was a success. That had said defendant known that she could rely on said McGowan to prosecute said claim to a final and successful termination, it would have been perfectly agreeable to her to have paid 15 per cent instead of what she did pay. But because said McGowan altogether ignored her wishes, interests, and duties and silently abandoned the cause he had agreed to prosecute, this defendant resorted to total strangers to take up an abandoned cause. Apparently, said complainants agreed with the Secretary that discretion was given to him to decide as he did. Certainly they took no steps to assert, still less to demonstrate, the contrary. Two years had passed and only one year more remained for any steps which could be taken for the assertion of any right which she possessed, when, having received no advice, suggestion, or communication even from said McGowan or said Brookshire, by the advice exclusively of others she filed the petition for mandamus, which was rewarded finally with complete success. She, there-

fore, alleges that said complainants never gave, sought, or pretended to give the consideration called for by his said alleged contract; that by failing in the important step of prosecuting said claim to its final determination, he disentitled himself to compensation for prior services rendered under his alleged contract, if such were rendered and is not entitled to anything for the final prosecution of a claim which he did not prosecute to its final determination.

Testimony was taken. On October 19, 1911, a final decree was entered sustaining the bill and directing the payment, after satisfying the costs out of the moneys held by the American Security and Trust Company to the complainants respectively the sum of $18,135.39, with interest at 6 per cent per annum from the 7th of June, 1909, and that any sum so remaining after the discharge of said claims be turned over to the defendant as executrix.

This is not the case of a creditor's bill to enforce a lien created by a decree of court as was Price *vs.* Forest, 173 U. S., 410. It is an original suit on written contracts with attorneys to prosecute a certain claim against the United States to final determination for stipulated fees equal to twenty per centum of the amount that might be collected, and with an express lien to secure the payment of the same. Setting out the contracts, the bill alleges the prosecution of the claim before Congress to the passage of a relieving act, the diligent but unsuccessful attempt to obtain payment under said act from the Secretary of the Treasury, and a readiness and willingness to continue the performance of the contract until prevented by the wrongful acts of the said claimant and of his executrix who succeeded to the legal control of the claim after the death of the claimant, December 26, 1904. Upon the allegations of the insolvency of the executrix and her intention to remove the funds from

the jurisdiction of the court, an injunction to prevent her receiving the fund was obtained. It can not be controverted that contracts like those set out in the bill, in so far at all events as they attempt to assign, or create a lien upon a claim against the United States are prohibited by section 3477, Revised Statutes, and thereby made absolutely void. Nutt *vs.* Knut, 200 U. S., 12-21; Bank *vs.* Downie, 218 U. S., 345. It was said, however, in Nutt *vs.* Knut, supra, that the provision of a contract evidencing an agreement to pay the attorney a fixed portion of the sum that might be recovered through his services, might stand alone notwithstanding the illegality of the provision for the lien, such provision giving the attorney no interest in the claim itself and creating no lien thereon. That case was prosecuted to judgment in a State court. As stated in the opinion of the Supreme Court of the United States, on error to the State court: "No lien is asserted by the plaintiff in his pleadings. While the original petition asserted his rights to be paid in accordance with the contract, the plaintiff claimed, if he could not be paid under the contract, that he be compensated according to the reasonable value of his services." The plaintiff had prosecuted the claim to final allowance, and appropriation for its payment. The question of jurisdiction in equity to entertain the case did not arise, and apparently could not have arisen under the procedure of the State. No such amendment was made in the case at bar. The complainants sued upon the contract as a whole, claiming the fee as fixed thereby, as well as the lien. Had there been an amendment abandoning the lien and relying on the quantum meruit solely, the equity court would have been without jurisdiction.

It is contended that the allegations of the bill are sufficient to show that complainants had an attorney's lien upon the fund finally adjudged to the claimant's

executrix, which could be enforced by the equity court. The bill alleges that complainants rendered the services that procured the act of Congress and also made diligent efforts to secure payment under that act by the Secretary to the time of his final refusal; that they were ready and willing to continue the prosecution of the claim to final determination and could have done so had not the claimant during the remainder of his life, and his executrix thereafter, refused to continue their services. Assuming for the present that these facts were proved as alleged, the fact remains that after dispensing with their services the executrix employed other attorneys who instituted and prosecuted the mandamus proceeding which resulted in the final judgment, under a special contract for a liberal fee. The executrix had the right, nevertheless, to dispense with complainants' services at any stage of the proceeding and retain other counsel (In re Paschal, 10 Wall., 483); though she could not thereby defeat their right to compensation for the reasonable value of their services before performed. Contracts for contingent fees are not illegal, and an attorney prosecuting a cause under such contract is entitled to a lien upon a judgment recovered by him therein as well as upon collections made by him thereunder; but the lien does not extend to a judgment recovered by other and independent attorneys without his cooperation. In re Wilson, 12 Fed., 235-237. In that case it was held in accordance with an able opinion of Judge Brown that an attorney had no lien upon a judgment in one cause for services rendered in another and related one. His conclusion was thus stated: "After an examination of the numerous authorities on this subject, English and American, I am satisfied, . . . that an attorney has no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular case." See,

also, Mass. & South Const. Co. *vs.* Township of Gills Creek, 48 Fed., 139-147; Foster *vs.* Danforth, 59 Fed., 750-751; Adams *vs.* Kehlor Milling Co., 38 Fed., 281-282. In the case last cited a judgment had been obtained in a State court, and the judgment on which the lien was claimed had been recovered in a suit to enforce the former judgment. The facts presented a stronger case than the one at bar. In the case the Secretary had refused to perform the act of Congress, and without his favorable action the claim was uncollectable. Nearly two years afterwards independent counsel instituted the litigation which resulted in the judgment compelling payment. There was, therefore, no attorney's lien on which to found jurisdiction in equity.

The allegation of the insolvency of the executrix and her intention to remove the fund from the jurisdiction upon its receipt, furnish no foundation for a creditor's bill to enforce a simple contract. They were pertinent allegations in the bill for the purpose of obtaining the injunction prayed. It was not a creditor's bill founded on a simple contract invoking the interposition of equity under extraordinary conditions to prevent certain and irreparable injury so as to being it within some of the exceptional cases in which a creditor's bill has been entertained upon a simple contract unreduced to judgment. Had such been its character and avowed purpose it would seem that the complainants were not without adequate remedy in another branch of the Supreme Court of the District. The will of J. W. Parish had been probated in the Supreme Court of the District holding a special term as a probate court and was still in administration. The sole power of the executrix to demand the payment and to institute the action to enforce it was derived from the letters testamentary granted to her on the probate of the will. The complainants could have applied for relief to that court

which, under the ample power conferred by the statute, could have required the executrix to give additional and sufficient bond for the protection of creditors, or else have revoked her letters and thus prevented her collection of the judgment. Code D. C., sections 263–296.

Ignoring the claim of the void contract lien there was nothing on the face of the bill to confer jurisdiction in equity. Hence the court might, in the exercise of its discretion and of its own motion, have dismissed the bill for want of jurisdiction, and should have sustained an objection thereto if presented. Were there nothing else in the case this court would in the exercise of its discretion under such conditions direct the dismissal of the bill.

It remains, therefore, to consider the effect claimed for the interlocutory decree entered by consent of the parties. The decree was entered before the answer was filed, and no objection was raised therein to the jurisdiction. There is no question but that one consenting to a final judgment or decree in a court having jurisdiction of the subject-matter will not be heard to complain of error therein on appeal or writ of error. U. S. *vs.* Babbitt, 104 U. S., 767; Nashville Ry. Co. *vs.* U. S., 113 U. S., 261-266; Gaus *vs.* Goldenberg, 40 W. L. R., 697. An interlocutory decree by consent may also be binding and work an estoppel in cases where it is expressly made for the particular purpose, and to procure some benefit. Re Met. Ry. Receivership, 208 U. S., 90-110. But in that case which was one for a receivership, the defendant for its own advantage consented to the appointment on a bill filed by simple contract creditors and did not seek to avoid the consequences of its consent by which others were affected. The language of the court was elicited on a proceeding by one who attempted to intervene in the cause and had been refused leave.

The restraining order in this case stopped the payment

of the entire fund of $181,358.95 in the hands of the Treasurer of the United States. It may be readily inferred that the consent to the decree was given to retain a sum sufficient to safely cover the full claim of complainants, namely, $41,000, in order that the remainder of the fund might be withdrawn at once from the Treasury. It is true that the defendant profited by the decree modifying the restraining order and releasing the remainder. But that would seem no more than she was entitled to demand of the court in any event, for even if the complainants' lien had been valid and enforcible they could not insist upon retaining more, subject to the process of the court, than enough to satisfy their lien and the costs of suit. The suit was upon the contract, as we have seen, and to enforce the lien created thereby. It was upon that contract and lien that the equity jurisdiction was invoked and assumed; and it was upon the assumption of that jurisdiction that the interlocutory decree was founded.

The answer of the defendant filed after the entry of the decree, shows that she regarded the suit as based solely upon the entire contract. She attacked the contract as illegal and void and submitted that issue for determination. She also sought to avoid it by alleging the failure of complainants to prosecute the claim to final determination; and also charged its voluntary abandonment. She presented no objection to the jurisdiction and none was necessary under the allegations of the bill, as the case presented turned upon the validity of the contract and would be disposed of by its determination. Certain recitals of the decree supplemented by the answer would seem, however, to amount to a waiver of the question of jurisdiction to the extent that complainants might claim the reasonable value of their services, and such waiver would, under the circumstances, justify an appellate court in exercising its discretion in retaining

the cause for hearing on its merits. Reynes *vs.* Dumont, 130 U. S., 354-395; Kilbourne *vs.* Sunderland, 130 U. S., 505-514; Brown *vs.* Lake Superior Iron Co., 134 U. S., 530-536; Hollins *vs.* Brairfield Coal & Iron Co., 150 U. S., 371-381; In re Met. Receivership, 208 U. S., 90-110; Tyler *vs.* Moses, 13 App. D. C., 428-443, 26 Wash. Law Rep., 771. The recital of the decree is that the $41,000 shall be held subject to the further order of the court, "subject to the determination by this court in this cause whether any amount and, if so, what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for and in respect of the matters described in the bill of complaint." The answer reciting the above proceeds as follows:

> "This defendant is advised and being so advised charges that the utmost which either complainant could claim for legal services would depend upon their reasonable value; and that their reasonable value would depend upon what legal services, if any, have been rendered. In directing attention to the inhibition interposed by said section 3477 to the relief prayed for in the bill, viz, that the court decree that said Jonas H. McGowan 'has an equitable lien on said finding and award and on the moneys payable, and that may be paid thereunder to the amount and in respect of $18,135.89,' the object of defendant is not to secure the transfer to another forum of any valid contention, which it is in the power of complainants to make under their alleged contracts, but simply to exhibit, as her duty requires, the limitations imposed by law thereon, in whatever forum the same may be adjudicated."

Under the views expressed, this decree and pleading furnished a ground for amending the bill converting the suit into one on a quantum meruit. No amendment was had, and the cause was heard upon the theory that the

allegations of the original bill were sufficient for the purpose. While evidence was taken at length to show the character of the services rendered to the time of the rejection of the claim of the Secretary, there was no evidence of their reasonable pecuniary value. The sole reliance for proof is the express stipulation of the contract. The admissibility and sufficiency of this is rested on the opinion of the court in Nutt *vs.* Knut, 208 U. S., 12-21. After holding that the contract for the lien was void, but that the agreement for the fee could nevertheless be enforced, it was there said: "Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the Government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation." The court was not then considering the evidence on which the demand was submitted in the court below. There is, moreover, an essential difference between the two cases. In that it appeared that the plaintiff had prosecuted the claim with diligence to final and successful determination. All that remained was to receive the money appropriated. The labor of the attorney was completely performed and nothing remained for him to do but to demand and receive his share of the second and final payment made to his client. Assuming that complainants were superseded in this case without cause by the defendant, yet the fact remains that the claim was still denied, and was not put in a situation for collection until some years thereafter. It was through the intelligent efforts and arduous labors of other attorneys that the action instituted by them resulted in forcing the final payment of the claim. As we have seen, a party may change his attorney at any time before the litigation shall have ended, remaining liable, of course, to the superseded attorney for the

reasonable value of the services already performed by him. In re Paschal, 10 Wall., 483-496. But it does not follow that the terms of the original contract furnished the measure of the reasonable value of the services partly performed. Such a doctrine would throw upon the client the burden of showing that the services performed were not of the actual value of the contract stipulation. It has no logical or just foundation. These conclusions would require the decree to be reversed and the cause remanded so that the pleadings may be amended and proof introduced on the issue of reasonable value. But it would serve no useful purpose to prolong the cause should the evidence fail to show that the complainants performed their contract so far as permitted by the claimant and his executrix, and indicated their readiness and willingness to continue the same to the final determination of the claim.

The original contract was with Jonas H. McGowan who was thereby given control of the prosecution of the claim. An interest of one-third in the fee contracted for was subsequently assigned by McGowan to complainant Brookshire. Later, another contract was entered into between Parish and Brookshire whereby the latter was to receive an additional fee of 5 per cent. It seems to be a settled rule of law that an attorney who is retained generally to conduct a cause is under obligation to conduct the proceeding to its termination. Nicholls *vs.* Wilson, 11 M. & W., 106; Tenny *vs.* Berger, 93 N. Y., 524-529. This, however, McGowan expressly promised in the concluding paragraph of his contract. The evidence shows that McGowan and attorneys acting under and in cooperation with him labored long and earnestly in procuring an acknowledgment by Congress of this ancient claim, during which period there was complete harmony with the claimant. McGowan, himself, drafted the bill which became a law February 17, 1903. Just as the

troubles seemed to have ended, they began afresh. The act was an ambiguous one, and the Secretary of the Treasury held that it vested him with discretion to examine and pass upon the right of the claimant to an assessment of damages. Although complainants diligently prosecuted the demand before the Treasury Department, the Secretary rejected it on May 31, 1904. It appears that shortly after the Secretary's decision a conference was had—Parish being present—to consider what additional steps might be taken to prosecute the claim. Three plans were considered: mandamus to the Secretary, a rehearing before him, reference to the Court of Claims. Nothing was decided upon. Later, in August, 1904, Parish said he would like the opinion of some attorney not connected with the case. He produced an opinion, but what it was does not appear. It seems to have been given August 8, 1904. It was suggested that the opinion of other and more distinguished counsel be obtained; but none was had. The matter seems to have rested a while in this condition. Parish was then in Washington where he remained until his death, December 26, 1904. On August 16th, desiring to raise money on his claim, he wrote McGowan to that effect, saying that if given a free hand he had the prospect of raising money to meet pressing demands at a reasonable cost. He asked for the return of a power of attorney held by McGowan. The power of attorney apparently referred to is one given to McGowan on March 25, 1903, making him his attorney to prosecute the claim before the Treasury Department and conferring general powers of representation. McGowan wrote back from Ontario, under date of August 21, 1904, saying he did not have the paper with him, but consenting to any arrangement Parish might make for a loan. It seems that Parish was negotiating with one Whitney, and under date of August 31, 1904, Mr. E. P. Morey, who had been associated with

complainants, wrote Whitney that there was every reason to believe that if other plans failed in the next ninety days, at the next session of Congress a direct appropriation would be made for payment of the full amount due as found by the Auditor. Nothing apparently was effected in the matter of the loan. The next thing that occurred was the following letter from Parish, which was produced from the files of McGowan's letters by his partner, the witness Serven:

"COMMITTEE ON CLAIMS,
HOUSE OF REPRESENTATIVES, U. S.
WASHINGTON, D. C., Sept. 15, '04.

"HON. J. H. MCGOWAN.

"MY DEAR SIR AND FRIEND: Your letter of the 25th ult. received in due time and contents noted, which I answered best I could but have no answer thus far to hand and will repeat in substance what I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially that you had done your best to get the Auditor's report in my case paid by the Secretary of the Treasury, and failed, etc., 'that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.'

"Sometime next Congress I propose to organize a practical method and resurrect the claim from its unfortunate condition, and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore I said that I would reimburse those who had advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit: 'that you would be glad and well satisfied to get the money advanced me' returned. My past record as to compensation—who had rendered me service you have not surely forgotten which was generous and as I remember very satisfactory to all concerned

as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm who is doing business here and in New York.

"Yours hastily, J. W. PARISH,
217 A Street S. E."

This letter either recited the truth as to McGowan's surrender of the case before going to Ontario, or a deliberate falsehood. A slight circumstance supporting its truth is the letter asking the return of the power of attorney and McGowan's consent thereto. Another circumstance is found in the testimony of McKee, an impartial witness, who had been journal clerk of the House of Representatives, and in the year 1904 had resigned to practice law. About a week before his death Parish asked witness to take up his claim and several conversations were had. Witness called upon McGowan and asked him who were the attorneys of record. McGowan said that he had prepared it and followed it up to the time it was rejected by the Secretary and added: "I don't care who collects it, I want my fee out of it." If false, McGowan was under obligation to contradict it. It is probable that other counsel associated with McGowan were not aware of this letter; but whether so or not, they are bound by his actions. E. L. Morey, one of the associates, testified that he called at Parish's house in October, 1904, to make an appointment with him for a consultation in reference to further proceedings. Not finding him he left word for him to call at the office. Parish did not come. The following letter was received by Parish from Morey, to which no response was made in any way:

"SUNDAY, October 9, 1904.

"DEAR MR. PARISH: I called at your house today, but failed to find you. I am extremely anxious to see you, as I have some very important news concerning your case, and, therefore, ask

that you call at my office tomorrow morning without fail. However, if for any reason you do not care to call at my office, telephone me and I will meet you at any place you suggest.

"Yours truly,

E. P. MOREY."

The letter to McGowan, above recited, remained unanswered. If its recitals were true, no reply was necessary; if untrue it should have been replied to promptly. The parties apparently met no more. On November 19, 1904, the following letter was mailed to Parish and received by him:

"November 19, 1904.

"MR. J. W. PARISH, 217 A Street S. E. City.

"DEAR SIR: We have done what we could to secure an interview with you concerning the ice claim. You have deliberately avoided us. The time has come when the matter should have attention. If we do not see you on or before Wednesday next, we shall proceed as we deem best under the ample authority which we have.

"Yours truly,

"J. H. MCGOWAN,
"E. P. MOREY,
"E. V. BROOKSHIRE."

Parish promptly replied to what he characterized as an "impudent and discourteous" letter, giving notice that he would not submit to methods which he called "bull dozing." There was also a sarcastic allusion to the ability displayed in the proceedings before the Secretary. Parish's letter of September 15th indicated that his plan was to apply for relief at the coming session of Congress. At any rate he beagan no litigation if he may had contemplated any. He died December 26, 1904, leaving a will but no property save the expectancy of this claim. The executrix took no substantial action looking to the collection of the claim, though she had

some conversation with McKee and others relating to it, which resulted in nothing, until on November 5, 1905, she entered into a contract with Mr. Holmes Conrad for the prosecution of the claim. He and his associate, Mr. Robinson, filed the petition for mandamus against the Secretary of the Treasury on May 2, 1906. Defeated in the trial court and the Court of Appeals, they obtained a reversal of the adverse decisions by the Supreme Court of the United States on May 17, 1909. See Parish *vs.* MacVeagh, 214 U. S., 124.

The executrix knew the former history of the claim and that complainants were the attorneys engaged in it to the time of its failure in the Treasury Department, but she had no knowledge of the written contracts. No legal steps had been taken by complainants under the ample authority claimed in their letter of November 19, 1904, before mentioned, before the death of Parish. Knowing of his death and the qualification of defendant as his executrix they gave her no notice of their contracts and their readiness to proceed with their performance with her consent. The counsel finally retained by her had no notice of complainants' contracts, and no offer of assistance was made to them.

The executrix could readily have supposed from her father's letter to McGowan, and the latter's failure to reply thereto, that he had regarded the prospect for the collection of the claim such as not worth further efforts on his part and was willing to let others undertake it. He said to McKee in December, 1904, that he did not care who collected it. That he also stated that he wanted his fee out of it is no importance. He was entitled to no fee unless he prosecuted the case to final determination. Nor was he entitled to have the reasonable value of his services before rendered without showing his willingness and readiness to proceed diligently, and the rejection of such tender by the executrix. The

burden was upon the complainants to show this tender of their services and there is no evidence of it. Now that the claim has been collected by others acting independently as attorneys for the executrix it seems a great hardship to complainants to receive no compensation for the effective services that they rendered in obtaining the legislation on which the successful litigation was founded, but it is the result of their own action or inaction at the critical time.

Several questions of evidence were raised at the hearing relating to statements made by the deceased Parish. So far as those were testified to by one of the complainants they are inadmissible by virtue of the provisions of the Code (sec. 1064) and have not been considered. While there may be some doubt as to the competency of similar evidence given by the attorneys, who were associated with the complainants and under contract with them for participation in their fees we have considered the evidence without passing upon the question of its admissibility.

For the reasons given we will reverse the decree with costs and remand the cause with direction to dismiss the bill. It is so ordered.

Reversed and dismissed.

Opinion of Court of Appeals January 13, 1913, Refusing Allowance of Appeal.

EMILY E. PARISH, EXECUTRIX,
vs.
JOSEPHINE P. MCGOWAN ET AL. } No. 2371.

Appellees pray for an appeal to the Supreme Court of the United States basing their right thereto upon the ground that the construction of a law of the United States is drawn in question by the defendant.

The defendant relied upon section 3477, R. S., as prohibiting the lien claimed by the plaintiffs, and on that rests the contention that the construction of a law of the United States is drawn in question.

The right to appeal is one of substance and not of mere form. The question of the validity of the lien is one that had been settled by the Supreme Court of the United States in construing section 3477, and was no longer an open one. The construction of the act could not, therefore, be drawn in question. State of Kansas *vs.* Bradley, 26 Federal, 289; Harris *vs.* Rosenberger, 145 Federal, 449-452.

We are constrained to refuse the allowance of the appeal.

SETH SHEPARD,
Chief Justice.

(Endorsed:) No. 2371. Emily E. Parish, Executrix of Joseph W. Parish, Deceased, Appellant, *vs.* Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire. Opinion on motion for allowance of an appeal to Supreme Court of the United States, per Mr. Chief Justice Shepard, Court of Appeals, District of Columbia. Filed Jan. 13, 1913. Henry W. Hodges, Clerk.

Opinion of the Supreme Court of the District of Columbia, Justice Stafford.

(Filed August 30, 1911.)

JONAS H. MCGOWAN AND ELIJAH V. BROOKSHIRE *vs.* EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, ET AL.	In Equity, No. 28,561.

This case was heard upon the pleadings and an interlocutory consent-decree and testimony, and having been fully argued and duly considered is now to be disposed of by a final decree.

The plaintiffs allege that they are attorneys at law, residing in the District of Columbia, and bring their bill against Emily E. Parish, also a resident of said District, as executrix of her father, Joseph W. Parish, deceased, and against the Secretary of the Treasury, and the Treasurer of the United States; that upon the 4th day of August, 1900, and for a long time prior thereto, said Joseph W. Parish had, and had asserted, a claim against the United States for a large sum of money as due to him under a contract that had been made in 1863 between said Parish on the one part and the United States, through one of its medical storekeepers, on the other part, for the furnishing of a quantity of ice; that on said 4th of August, said Parish entered into a contract and agreement in writing with said McGowan, which is set out *verbatim* in the bill and which witnesses, that Parish employs McGowan to prosecute and collect said claim, and that in consideration of the services rendered and to be rendered by McGowan, and by others whom he might employ in the prosecution of the claim, Parish agrees to pay McGowan "a fee equal in amount to fifteen per centum of whatever sum of money or other

evidence of indebtedness may be awarded or collected on account of said claim," and witnesses further that McGowan shall have control of the prosecution to its final termination, with power to receive and receipt for any draft or other evidence of indebtedness which may be issued in payment thereof, and to retain from the proceeds the amount of the stipulated fee, that Parish shall furnish all evidence and papers required, and execute all necessary papers both for the prosecution of the claim and the payment of the fee, that Parish shall in no event dispose of any part of the claim, that the agreement shall not be affected by any revocation, nor by any services rendered by others, or by Parish himself, and that McGowan shall diligently prosecute the claim to the best of his professional ability and to its final determination. The plaintiffs further allege that for a long time before said 4th day of August McGowan had rendered professional services as a lawyer to Parish in the prosecution and preparation of the said claim; that thereafter McGowan continued his services in the prosecution of the claim before Congress and various committees thereof; that on the 3rd day of December, 1902, McGowan and Parish, wishing to secure the services of said Brookshire, made an assignment to and an agreement with him in writing, which writing is set forth *verbatim* in the bill, but is in form an agreement between McGowan and Brookshire and signed by McGowan alone. In consideration of $5 and other valuable consideration, McGowan thereby assigns to Brookshire an undivided one-third interest in his contract with Parish dated August 4, 1900, reciting that said agreement with Brookshire would terminate with services in the then present Congress, provided that the pending bill should not pass, but, if it should pass, would then terminate with the action of the Secretary of War and the final determination upon the claim by the execu-

tive and disbursing officers of the Government. The plaintiffs further allege that on or about the 20th day of January, 1903, Parish and Brookshire themselves entered into an agreement in writing, under that date, whereby Brookshire agreed to render legal services in the prosecution of the claim under the direction of Parish, and in consideration thereof and for value received, and in consideration of services theretofore rendered by Brookshire in the same matter, Parish agreed to pay Brookshire a sum equal to 5 per cent of the amount awarded or appropriated for the payment of the claim, said contract to be an order upon the proper officer of the Government, and to constitute a lien for the amount due Brookshire. The plaintiffs further allege that, pursuant to said agreements, they diligently prosecuted the claim, and rendered valuable services in preparing and presenting arguments before committees of Congress in collecting evidence and presenting petitions and briefs in the effort to obtain an act of Congress for the settlement of the claim; that thereafter Congress did pass an act approved February 17, 1903, which is set forth in the bill, and which authorizes and instructs the Secretary of the Treasury "to make full and complete examination into the claim" under certain rules therein stated, and, having ascertained the balance due Parish to pay the same to him, for which payment the act appropriated whatever sum should be necessary; that said act was drafted by McGowan and was advocated and urged in all proper ways before the several committees by both the plaintiffs; that immediately after the passage of the act, the Secretary of the Treasury referred the claim to the proper officer, namely, the Auditor of the War Department, and the plaintiffs appeared before the Auditor and rendered valuable services, filing briefs and arguments, and that on the 11th day of August, 1903, said Auditor made a finding to the effect that there was

a balance due Parish of $181,358.95 and upon the same day sent McGowan as attorney for Parish a notice of the allowance, which notice is set forth in full in the bill; that on receiving the Auditor's return of his finding and award, the Secretary of the Treasury referred the claim to the Comptroller; that the plaintiffs appeared before the Comptroller and submitted elaborate arguments to him; that the Comptroller made an adverse report to the Secretary; that the Secretary gave the claim further consideration and referred it to the solicitor of the Treasury; that the plaintiffs appeared and made arguments before the Solicitor; that the Solicitor made an adverse report to the Secretary; that the Secretary again considered the claim, and the plaintiffs argued the matter before him at great length, and after laborious preparation; that on or about the 31st day of May, 1904, the Secretary decided the case, refusing to pay the balance ascertained by the Auditor or any sum whatever. The plaintiffs further allege that after said decision they advised with Parish as to the steps to be taken to enforce payment, and had especially under consideration the expediency of filing a petition for the writ of *mandamus* against the Secretary for the amount found due by the Auditor, and were still considering the question and awaiting the return of Parish to the District of Columbia until the time of his death, which occurred December 26, 1904; that Parish and his family had been in very necessitous circumstances for a long time prior to his death, and to relieve their pressing wants the plaintiffs had from time to time advanced to Parish money amounting in the whole to $5,000, relying solely on his promise to repay the same out of said claim when received; that on April 3, 1905, the will of Parish was offered for probate in this District and, April 7, 1905, was duly admitted and letters of administration were issued to Emily E. Parish as executrix; that the estate

of Parish was represented to the court as consisting of only his wearing apparel and said claim against the Government; that claims have been presented against the estate, one for $9,160.70 in favor of D. Christophani, one in favor of Emily E. Parish for $12,000 for services claimed to have been rendered, and miscellaneous claims to the amount of $1,500; that no account has been filed by the executrix. The plaintiffs further allege that the executrix has disregarded their rights in the claim and their services in respect to it, although knowing that they were ready to continue their services, and has employed other counsel without advising with the plaintiffs, and that on May 2, 1906, by her said attorneys, she filed her petition, on the law side of this court, for a writ of *mandamus* to the Secretary of the Treasury, requiring him to issue a draft in her favor for the amount found due by the Auditor for the War Department, basing her petition solely on the ground that every condition precedent to payment to said Joseph W. Parish in accordance with said act of February 17, 1903, had been satisfied by the examination and settlement made on August 11, 1903, by the Auditor of the War Department (which examination and settlement, they allege, were the result of their services), and that there remained only the ministerial duty on the part of the Secretary to pay the amount found due by the Auditor; and they refer to the transcript of the record of the case in the Supreme Court of the United States and made a copy thereof a part of the bill. The plaintiffs further allege that, the Secretary having answered said petition and a demurrer to said answer having been interposed, the demurrer was sustained in this court and the petition dismissed; that on appeal from said judgment the same was affirmed by the Court of Appeals, but in the Supreme Court of the United States, to which said cause was carried by writ of error, the judgments of the lower

courts were reversed, and a writ was ordered as prayed. The plaintiffs further allege that a mandate is about to come down for the issuing of the said writ of *mandamus* which will require the Secretary to issue a draft to the executrix for said sum; and they aver on information and belief that it is the declared purpose of the executrix to disregard the lien and claims of the plaintiffs, and that she and her brother, Grant Parish, have avowed that the plaintiffs shall never have a cent of the money; that said estate is insolvent except for said claim-fund, and that claims against the estate have been proved to the amount of about $25,000, although none of them have been paid; that they are informed and believe and aver that Emily E. Parish and Grant Parish are insolvent and that if they receive the draft or its proceeds they will immediately remove the same from the jurisdiction of this court for the purpose of defrauding the plaintiffs of their rightful claim to the fund. They further allege that by reason of the premises each of them is equitable owner of one-tenth of said fund, and has a lien upon said fund in respect to said one-tenth part.

Wherefore they pray that the court will decree that McGowan is the equitable owner of one-tenth of said award and sum, and has an equitable lien on the same to that extent, and will decree likewise in respect to Brookshire; that the Secretary of the Treasury and the Treasurer of the United States may be enjoined from issuing any such draft for the executrix and from paying to her the amount of said award or any part thereof; that a receiver be appointed to receive the payment of said award and hold the same subject to the order of the court; that said Secretary may be restrained by a preliminary order from issuing any such draft or making any such payment; and that the plaintiffs may have such other relief as they are entitled to in equity. They

also pray for process against all three defendants and that they be required to answer the bill, but not under oath, as the plaintiffs waive any answer under oath.

The bill was filed May 22, 1909, and a restraining order against the Secretary and the Treasurer, as well as against the executrix, issued as prayed, but on June 2, 1909, and before any answer was made, an interlocutory decree was entered by consent of the plaintiffs and executrix. This decree dissolved the restraining order and dismissed the Secretary and the Treasurer, but as to the executrix it provided that in respect to the sum of $41,000, and any warrant, draft or check that might be issued therefor by the Treasury Department, or any part thereof, as being a part of said award, the executrix was enjoined from receiving any such warrant or draft or sum of money, and was required to execute a power of attorney to the vice-president of the American Security and Trust Company to receive and endorse said draft in her name, and to collect the proceeds thereof, and deposit the same with the said Trust Company "to the credit of this cause and subject to the further order of this court herein, and subject to the determination by this court in this cause whether any amount, and if so what amount, is justly due the complainants, or either of them, for professional services rendered by them, or either of them, for or in respect of the matters described in the bill of complaint." Said sum when deposited was to be held by the Trust Company without compensation and paying interest thereon at 2 per cent, "the said sum and the accrued interest thereon to be subject to the order and decree of this court in this cause." Under this decree a draft for $41,000 was issued and collected and deposited, and is now in the hands of the trustee subject to the order of the court. The remainder of said fund has been received

by the executrix and accounted for by her in the probate court.

The defendant by her answer admits the existence of the claim of her father against the United States and that he had been asserting the same for a long time before the 4th of August, 1900, but says she has no personal knowledge of the alleged agreement of that date between her father and McGowan, nor has she any personal knowledge of the alleged assignment of a one-third interest therein to Brookshire, or of the alleged contract between Brookshire and her father, but she says that if such contracts were made as alleged they were in violation of the Revised Statutes of the United States, section 3477, in so far as they undertook to assign any part of a claim against the United States or give the plaintiffs any lien thereon, and were to that extent null and void. She says that she has, however, joined in the consent-decree, whereby $41,000 was directed to be deposited with said Trust Company to the credit of this cause, subject to the determination of the court, as hereinbefore set forth; but she charges that the utmost which either of the plaintiffs could claim would be the reasonable value of the legal services rendered by him. She does not desire to transfer the determination of the question to any other forum, but to have it decided in this forum in accordance with the rules of equity. She does not know whether the plaintiffs advocated and urged the passage of the bill and the allowance of the claim as alleged, but admits the action of Congress, of the auditor, and of the Secretary as alleged. She denies that the plaintiffs advised with her father in respect to the steps to be taken to enforce payment of the award or that they had under consideration the expediency of filing a petition for a writ of *mandamus* and says that they never approached her after her father's death in respect to such matters, and that she never heard of the proposal to file such a petition until

it came to her from the other counsel, who brought the petition; on the contrary, she says that after the Secretary's refusal the plaintiffs abandoned all prosecution of the claim. She says she has no knowledge of the alleged loan of $5,000, but that if it was made, it is barred by the Statute of Limitations. She says it is true that the will was proved and the letters issued as alleged, and claims against the estate have been presented as alleged, and that although she had not filed any account when the bill was brought, she has since filed one. She denies that she has disregarded the rights of the plaintiffs or that she knew that the plaintiffs were ready to render services in the further prosecution of the claim, and avers on information and belief that one of the plaintiffs repeatedly asserted that there was no remedy by *mandamus*. She denies that she has any purpose to refuse to recognize any valid claim against the estate, but makes no specific answer to the charge that she was about to remove with the fund from the jurisdiction of this court. She says that all claims proved against the estate have been paid in full and her account passed and approved. She denies that either she or her brother is insolvent and calls attention to the fact that the court has now in its custody a sufficient sum to satisfy the plaintiffs' claims if they are valid. She denies, however, that the plaintiffs or either of them have any claims upon said fund. She says that if the plaintiffs had any claim against her father for services they ought to have been presented against his estate and, the time having passed wherein they should have been presented, that they are barred. She says that by his alleged contract with her father McGowan was bound to prosecute the claim diligently to the best of his ability to its final termination, and that this was the consideration for the agreement, and that there has been a breach of this contract on McGowan's part, he having failed to prosecute the claim to its final

determination and having abandoned the claim so that his work had to be done by others.

McGowan has died since the bill was brought and his executrix is now prosecuting the bill in his place.

From this analysis of the pleadings it appears that the objections raised by the defendant to the plaintiffs' case are the following:

(1) That the plaintiffs' claims, if any, are barred by their failure to have the same passed and approved by the probate court within the time limited by the statute.

(2) That the lien asserted by the plaintiffs is in violation of the Revised Statutes, section 3477.

(3) That even taking the contract of McGowan as it read, he has not fulfilled its condition and is therefore entitled to nothing.

(4) That the plaintiffs totally abandoned the prosecution of the claim and voluntarily relinquished all rights they may have had under their contracts.

(5) That in any view of the case the plaintiffs are entitled to nothing more than the reasonable value of their services.

(1) As to the first objection, it is unnecessary to say more than that the point is not made in the brief of the defendant and is evidently abandoned, the claims not having become due until the fund was realized, which was after the expiration of the time fixed by statute for proving claims in the probate court.

(2) As to the second objection, that the contracts were null and void as against the statute, so far as they attempted to give a lien upon the fund sought to be recovered:

The first question is whether this objection is one that can be taken, in view of the consent-decree. That declares that the fund paid into the court shall be held "subject to the determination by the court whether any amount, and, if so, what amount, is justly due the com-

plainants, or either of them, for professional services rendered by them or either of them for and in respect of the matters described in the bill of complaint." No other question is reserved. What shall be done with the fund is declared to depend upon these two questions alone—is anything due? If so, how much? No question touching the existence of a lien upon the original fund is reserved or mentioned. The bill is brought charging that a lien existed and charging that the defendant was insolvent and was about to remove from the jurisdiction taking the fund with her, and that she had declared her purpose to prevent the plaintiffs from realizing anything upon their claim. With no denial of these claims upon the record—before any answer is filed—the defendant consents that a portion of the fund in question shall be paid into court and be held by the court subject only to the determination whether she owes the plaintiffs anything upon their claims for professional services rendered, and if so, how much. Can there be any doubt that thereby she has eliminated the question of a lien upon the original fund, and consented that if there is anything due the plaintiffs they shall be satisfied out of the fund paid into court? We think not. After such a decree, we think, it was not open to the defendant to raise by her answer any question touching the validity of the contracts in respect to a lien. That question had been waived.

It is not maintained by the defendant that the contracts were void so far as they provided for the rendering of services by the plaintiffs and for their receiving compensation therefor. That question is settled by Nutt *vs.* Knut, 200 U. S., 12. Hence we fail to see what the statute has to do with the case in its present posture.

The authority of the court to enter the decree can hardly be questioned. The court had jurisdiction, in this cause, as between the plaintiffs and the executrix,

with or without consent to appoint a receiver, and put the chose in action into its hands. There was nothing in such a course that would have contravened the statute, section 3477. Price *vs.* Forrest, 173 U. S., 410, 423, 424. In place of a receiver being appointed, the parties consented to the payment of a sufficient portion of the fund into court. The Government acted upon the consent of the parties, and paid the fund in accordance with their agreement as embodied in the decree. Thereafter no question could arise under the statute so far as the protection of the Government was concerned, and the right of the court to adjust the equities between the principal parties was not restricted by the statute. If a receiver had been appointed and the whole fund placed in his hands, there would have been no violation of the statute, for, in that case, the receiver would have administered the whole fund under the order of the court, as was done in Price *vs.* Forrest. That the court is now to administer only a part of the fund, the remainder having been disposed of by the executrix with the consent of all parties, can not make the case less strong for the plaintiffs. Of course, except for the language of the decree, the question might still remain, whether the plaintiffs had any lien by virtue of their contracts; but this question, as we have said, is eliminated by the decree, which reserves only the question of indebtedness and the amount thereof.

But do the plaintiffs need to assert any lien by virtue of their written contracts? They alleged that they were creditors and that the only fund to which they could look was about to be taken out of the jurisdiction for the purpose of preventing the collection of their debts, and, before answering the bill, the defendant consents to the payment of the fund into court to be held subject to the determination of the two questions, whether the defendant is indebted to the plaintiffs, and if so, to

what extent. If it shall be determined that the indebtedness does exist, is it not to be paid out of the fund? Equity having jurisdiction of the case upon the face of the bill, and the parties having admitted that jurisdiction in the most solemn way by consenting to a decree, the court having signed the decree and taken the custody of the fund, and the question to be determined with respect to the fund having been distinctly stated in the decree, can the defendant now say that there are other questions to be decided affecting not only the rights of the plaintiffs but the very jurisdiction of the court?

Observe the facts in Price *vs.* Forrest, and note the resemblance between that case and this. Price had a claim against the United States, which Congress directed the Secretary of the Treasury to adjust on principles of equity, and pay the sum found due to him or his heirs. It was adjusted at the sum of $76,000 and over. Meanwhile Forrest had recovered a judgment against Price in the courts of New Jersey for $17,000, and died without collecting it. His widow filed a petition for a receiver, stating that the money due Price on his claim against the United States was about to be paid to Price. A receiver was appointed. Then Price died, leaving no will. An administrator *ad prosequendum* was appointed on his estate, and Forrest's widow sought to have him made a party to the receivership case, and to have him and the other parties claiming an interest enjoined from receiving the money from the United States, and to have the fund disbursed by the receiver under the orders of the court. The heirs of Price claimed the fund; but the New Jersey court held that the plaintiffs were entitled to the moneys in the Treasury under and by virtue of the order of the court appointing the receiver; and the judgment was sustained by the Supreme Court of the

United States. The objection was made that the appointment of the receiver could not operate to transfer the fund because that would be contrary to Revised Statutes 3477; but the court held that such a transfer was one by operation of law and did not come within the statute. The object of the statute, the court said, was not to protect the claimant but to protect the Government and to prevent frauds upon the Treasury (see p. 423). We quote:

> "There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor, forbid the claimant from collecting his demand except through a receiver, who should hold the proceeds subject to be disposed of according to law under the order of the court, we are unable to say that such action would be inconsistent with section 3477. Even if it be true that the final order of the State court in relation to the money question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of the court appointing the receiver would be null and void, as between those who are parties to the cause and are before the court."

In the present case the question arises solely between the principal parties. They have placed in the hands of the court a fund, which, as between them, the court would have had a right to take into its custody even against the objection of the defendant. There can be no question, then, touching the jurisdiction and power of the court to make the decree in this cause.

Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund if they are entitled to anything for professional services in producing the fund? Upon ordinary principles applying to the relation of attorney and client, if the fund is the fruit of their professional skill and labor, they have a lien upon it to the extent of the compensation they are entitled to receive. Mechem on Agency, sec. 868; 4 Cyc, 1005. For these reasons we do not feel embarrassed by section 3477 in dealing with the case as equity may require.

(3) The third objection is that plaintiffs are precluded from recovery by reason of inexcusable failure to carry the claim through to a final determination.

This raises a question of fact. The case was carried through its later stages by other counsel. Was this due to the fault of the plaintiffs, or to the action of the defendant and her decedent? The situation of the case after the final decision of the Secretary presented a problem of great perplexity. It is easy enough to say now, after the decision of the court of last resort, that there should have been no doubt about the proper course to pursue. But in fairness to the plaintiffs we must not forget that not only had several officers of the Government, including the Secretary of the Treasury, taken a contrary view, but so did the law branch of this court and the Court of Appeals. It is not strange that attorneys should have questioned whether *mandamus* or some other remedy was the wise one to seek. If Congress had intended to

leave the Secretary no discretion, counsel might not unreasonably assume that on the facts being called to the attention of Congress it would pass an act appropriating the specific amount found due by the auditor. This course may have seemed wiser to the plaintiffs than a petition for *mandamus*. If it did we are not sure that they should be condemned as incompetent. It is plain to us, however, from our consideration of the evidence, that the failure of the plaintiffs to proceed in some manner to the collection of the claim was due to the attitude taken towards them by the decedent during the last months of his life, and by his executrix after his death. We think that if they had been fairly and frankly dealt with they were prepared to go on and would have gone on as their best judgment directed in the prosecution of the claim. The evidence is too detailed and fragmentary to make it worth while to piece it together here, and it would require more space than can be given to it. Moreover, it is fully reviewed in the briefs of the counsel on both sides, and it will be enough to say that we incline strongly to the view of the plaintiffs' counsel upon this question as well as upon the next question, which is also mainly a question of fact, viz:

(4) Did the plaintiffs abandon and relinquish their right to prosecute, and their right to be compensated, under their contracts?

It would certainly require very considerable evidence to convince us that the plaintiffs, after the time and labor they had expended upon the claim, had intentionally abandoned it. Perplexing and embarrassing as the situation was, it certainly was not hopeless from any point of view, and there is nothing in the evidence that convinces us that either of them ever intended to abandon, or ever gave the decedent or his executrix to understand that such was their intention. They had a right, as they were bound, to use their own best judgment and

ability, and we are satisfied that if they had been fairly treated they would have continued in the management of the case. The attitude of the defendant and of her father towards them had been such as to make it difficult for them to proceed. They sought to have an interview with the decedent near the end of his life, when the course to be taken should be determined, and the interview was denied. In such circumstances it is not for the defendant to set up the proposition that they had abandoned their large interest in the claim. In her own course towards them she was apparently pursuing that which her father had mapped out for her, and ignored their relation to the claim, although she must have known in a general way what it was. There is no doubt that she knew they had been prosecuting the claim, and had been making advances on the strength of their relation to it. The contract between Parish and McGowan plainly contemplated that Parish himself or others whom he might employ might assist in the prosecution of the claim, although McGowan's right to compensation was not to be affected thereby. We think the plaintiffs had a right to understand that this course was being pursued and to stand upon their right to compensation according to the terms of the contract.

(5) We are thus brought to the fifth question, which concerns the amount which the plaintiffs are entitled to receive. It has been strongly insisted by the defendant that the plaintiffs rendered no services of any substantial value, but we can not adopt this view. Both McGowan and Brookshire had been at work upon the claim for years, and we think that Brookshire's contract as well as McGowan's is to be taken as referring to services already performed as well as those thereafter to be performed. The words, "for value received," in Brookshire's contract must refer, we think, to such prior services, even though we hold ourselves to the exact wording

of the contract, which very likely was intended to read "heretofore" where it does read "hereafter." It is not necessary to find that the plaintiffs' services were in all respects the best that could have been rendered, but there is nothing to show that they were not the best they were capable of rendering, and their own deep interest in the claim would have prompted them to do their best. That their services were of real value is certain from the fact that they resulted in the passage of the act and in the finding by the auditor, which were finally held to constitute a sufficient basis for a writ of *mandamus*. It is true that the act was ambiguous in some respects and left it a matter of contention whether a discretion was vested in the Secretary, but it is not for us to say upon this record that a more explicit act would have met with the approval of Congress. Congress was not prepared to appropriate a specific amount. It considered it necessary not only that a computation should be made but that there should be an ascertainment of the amount it would have cost Parish to have delivered the ice which was not actually delivered; and when this amount had been ascertained by the auditor the court was able to hold that the amount to which Parish was entitled had been made certain.

Parish *vs.* MacVeagh, 214 U. S., 124.

It was perfectly competent for the parties to these contracts to stipulate in advance for the exact amount of the compensation to be paid and received, and that they did. The contract having been performed on the part of the plaintiffs as far as they were permitted to perform it, we see no reason why they should not receive the amount agreed upon.

Nutt *vs.* Knut, 200 U. S., 12.

A decree will be entered accordingly.

WENDELL P. STAFFORD,
Justice.

IN THE

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Application for the Allowance of an Appeal of Josephine P. McGowan, Executrix of Jonas H. McGowan, Deceased, and Elijah V. Brookshire, in the Case in the Court of Appeals of the District of Columbia, No. 2371, Entitled—

EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, APPELLANT,

vs.

JOSEPHINE P. McGOWAN, EXECUTRIX OF JONAS H. McGOWAN, DECEASED, and ELIJAH V. BROOKSHIRE, APPELLEES.

Appellant's Note in Opposition to Application of Appellees for the Allowance of an Appeal to the Supreme Court of the United States from the Judgment Entered by the Court of Appeals, District of Columbia, in This Cause on the 4th Day of November, 1912.

FRIDAY, *January* 17, 1913.

Counsel for the executrix have this day received the proof of the brief expected to be filed by the applicants, and proceed at once to reply thereto.

I.

In stating the purpose of their bill, the applicants for the allowance of an appeal now advise this court *"a lien* was claimed by plaintiffs on the proceeds of the claim, *based upon the express terms of their contracts."* It is added, "and based also upon the rendition of professional services in the recovery of the proceeds." Necessarily, a contract with lawyers was in consideration of services which were expected to be rendered by lawyers; but no further or other lien was claimed by plaintiffs than the one stated above, viz., a lien *based upon the express terms of their contracts."*

The contract with Brookshire reads: "For value received and for legal services *hereafter* rendered and to be rendered by E. V. Brookshire in the prosecution of my claim against the Government of the United States, and which is more particularly described in Senate bill No. 475, 1st session 57th Congress, I hereby agree to pay to said Brookshire a sum equal to 5 per centum of the amount awarded or appropriated for the payment of said claim. This *contract* to be an order upon the proper officer of the Government, or any one authorized to disburse said award so appropriated, and *it is expressly understood that said Brookshire shall have a lien for the amount due him upon the amount due upon the amount of the said award when the same is made"* (Rec., p. 27). The contract with McGowan was differently worded, but means the same thing. The lien claimed by plaintiffs is *"based upon the express terms of their contracts."*

The sentence in the brief of applicant continues, "and they availed themselves of the *speedy preventative writs of equity because of the necessities of their case* in respects not material here.

Counsel for the executrix deemed it not immaterial here to call attention to the preventative precautions to which plaintiffs resorted "because of the necessities of their case." The plaintiffs averred in their bill as grounds for equity

jurisdiction "the expressly declared intention, will, and purpose of the said Emily E. Parish, her agents and attorneys, to ignore and refuse to recognize the *lien* and claim of your complainants to the said fund of $181,358.95, *created and established by the contracts and agreements hereinbefore mentioned and set forth.* * * * Said defendant, Emily E. Parish, and her brother, Grant Parish, have avowed and declared that they, the said complainants, shall never have a cent of said money" (Rec., p. 9, par. 8). If complainants knew of such avowals it was their duty to prove them. They did not prove them. Therefore, the inference is they did not know them, although they were averred under oath to give jurisdiction to the court.

They aver the insolvency of the estate of Joseph W. Parish as another ground of jurisdiction; but, as they well knew, the United States Supreme Court had a few days before adjudged the estate of J. W. Parish to be entitled to receive from the United States Government $181,358.95. Because of this knowledge their bill was filed. They aver as further ground of jurisdiction, "on information and belief," that both Emily E. Parish and Grant Parish are insolvent. For the reason stated above they knew they were not. On the same "information and belief" (and for the same purpose of giving jurisdiction), it is averred that if defendant and her brother receive the draft or proceeds thereof "about to be issued by the Secretary of the Treasury, they will immediately take the same out of the jurisdiction of the court for the purpose of defrauding and defeating complainants of their rightful *lien and claim on said fund.*" None of these averments were attempted to be proved. All were disproved by the defendant.

In order to secure the jurisdiction of equity averments were made on information and belief without a shred of the information, which alone would justify belief. If the plaintiffs knew of the alleged avowals it was their duty to prove them. They offered no proof, produced no witness who heard the declaration or avowal.

Coming to what the plaintiffs consider *"material here,"* it is proper to say that the adjudication in favor of defendant, from which appeal is sought, rested on two grounds, (1) that the plaintiffs had abandoned their contract before the institution of the suit in which recovery was had; (2) the violation by plaintiffs of section 3477.

II.

The appeal is prayed for under the following provision of section 250 of the judicial code:

> *"In cases in which the construction of any law of the United States is drawn in question by the defendant."*

Under this clause, and only thereunder, is submitted the prayer for the allowance of an appeal. As matter of fact and matter of record, no law of the United States is drawn in question by the defendant. To draw in question or to call in question a construction is to challenge a construction. So far from drawing in question a law of the United States, the defendant, without a suggestion that there can be any difference of opinion on the subject, invokes, calls to her aid, the only law of the United States to which reference can be had, viz., section 3477 of the Revised Statutes. This was not to draw in question the construction of said section. The statute, indeed, is expressed in such plain, unambiguous terms that no room is left for construction.

The highest evidence of a man's good standing in the community is that no one ever heard it *called in question.* This does not mean that no one ever heard it mentioned; ever heard it approved; ever heard it quoted as authority for an opinion, for a course of conduct, or principle of action. It means that no one ever heard it doubted, disputed—*"drawn in question."*

When the town clerk of Ephesus said: "We are in danger of being called in question for this day's uproar," he meant

in danger of being reproved, rebuked, called to account, impeached therefor.

In the present case not only no such controversy as to the construction of the law is raised by the defendant, but nothing of the kind exists in the case. The construction of said section 3477 is not drawn in question by any one. It is, indeed, sought to be maintained by the plaintiffs that the effect of the statute had been waived by the defendant by reason of her participation in a consent decree; but this did not draw in question the construction of the law. The trial court held that by reason of this consent decree the question of the validity of the contracts had been waived, and this decision was reversed by the Court of Appeals.

It was also sought to be maintained that plaintiffs were not claiming under their written contracts, but under their liens as attorneys. This contention was sustained by the trial court, and this also was reversed by the Court of Appeals. But this did not draw in question the construction of said section, even if the right of appeal therefor were not limited to such contention made by the defendant. No suggestion came from any one that section 3477 did not mean exactly what it said, and did not say exactly what was meant, or that there was any doubt as to what was said or what was meant.

In short, the contention of the plaintiffs was not an opposing or different construction of said section 3477, but what in an action at law would be called a plea in confession and avoidance.

It may be proper to make this clear by extracts from the opinions heretofore filed.

The trial court held, as to the ground

> "that the contracts were null and void as against the statute, so far as they attempted to give a lien upon the fund sought to be recovered: The first question is whether this objection can be taken in view of the consent decree. That declares that the fund paid into the court shall be held 'subject to the determination by the court whether any amount, and if so, what amount, is justly due by the complainants, or

> either of them, for and in respect of the matters described in the bill of complaint.' No other question is reserved. * * * Can there be any doubt that thereby she (the executrix) has eliminated the question of a lien upon the original fund, and consented that if there is anything due the plaintiffs, they shall be satisfied out of the fund paid into court? We think not. After such a decree, we think it was not open to the defendant *to raise by her answer* any question touching the validity of the contracts in respect to a lien. *That question has been waived*" (Rec., p. 219).

Had the entire sum of $181,000 been held up to abide the final determination of the suit, the plaintiffs would have been called on to file an undertaking "to make good to the defendant all damages by her suffered or sustained by reason of wrongfully and inequitably suing out the injunction." In the meantime the defendant would have been deprived of the use of all over and above the $41,000 which was in issue, *i. e.*, of an uncontested fund. By the consent decree the plaintiffs avoided the necessity to give the undertaking, which might have been inconvenient, and the defendant received at once that portion of the fund which was not "drawn in question." These were the obvious motives operating on both sides to do what was done. This consent decree was entered some ten days after the bill of plaintiffs had been filed.

The defendant's counsel, it is clear, did not know such a waiver had been made. The answer when filed at once interposed the defense arising under the statute. Complainant's counsel could not have realized this waiver, since to the defendant's answer they filed their general replication to put in issue everything which had been set up as the defense to the bill. If the denial of the validity of the contracts had been waived by the consent decree the replication should not have joined issue thereon, but should have shown that no issue could be raised concerning said section.

> "If the matters set up in an answer as a defense have been previously adjudicated it should be set up

by plea or replication, upon which issue can be taken, so as to give the defendant an opportunity to present any evidence he may have on the subject."

Thrifts vs. Thrifts, 101 Ill., 458.

"If the complainant wishes to avoid the effect of matter pleaded in bar his proper course is to apply to amend the charging part of his bill."

Fletcher's Equity Pleadings, sec. 356; 2 Dan. Ch. Pr., 829-830-834.

The policy and purpose of interlocutory procedure is to prepare causes for hearing upon their merits.

"The practice in courts of chancery gives to defendants a reasonable time to interpose a defense by way of demurrer and answer, and it would violate that rule of practice to grant the prayer of the bill merely upon its being filed and *upon a motion for a temporary injunction.*"

Western Union Tel. Co. vs. Pacific & Atlantic Tel. Co., 49 Ill., 93.

But had it been the deliberate and expressed intent of defendant's counsel to "eliminate" from the issues to be tried "any question touching the validity of the contracts" in this case, it would have been out of their power to accomplish it and out of the power of the court to permit it.

"The instruction given that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants was founded upon a misconception of the law. In such cases there can be no waiver. * * * *No consent of the defendant can neutralize its effect.*"

Coppell vs. Hall, 7 Wall., 558.

From the opinion of the trial court it is seen that the construction of the statute is not *drawn in question;* but to effect the "elimination" of a statute, whose construction is undisputed, it is claimed the statute, in this unpremeditated fashion, has been waived (the consent decree will be found

on pages 12 and 13 of the Record). As to this contention it is said by the Court of Appeals:

> "It remains, therefore, to consider the effect claimed for the interlocutory decree entered by consent of parties. * * * The restraining order in this case stopped the payment of the entire fund of $181,358.95 in the hands of the Treasurer of the United States. It may be readily inferred that the consent to the decree was given to retain a sum sufficient to safely cover the full claim of complainants, viz., $41,000, in order that the remainder of the fund might be withdrawn at once from the Treasury. It is true that the defendant profited by the decree modifying the restraining order and releasing the remainder. But that would seem no more than she was entitled to demand of the court in any event. * * * This decree and pleading furnished a ground for amending the bill, converting the suit into one on a *quantum meruit*. No amendment was had, and the cause was heard upon the theory that the allegations of the original bill were sufficient for the purpose. * * * But it would serve no useful purpose to prolong the cause, should the evidence fail to show that the complainants performed their contract, so far as permitted by the claimant and his executrix, and indicated their readiness and willingness to continue the same to the final determination of the claims."

III.

Neither the averments of the bill nor the facts offered in evidence sustain the claim of a lien upon a judgment secured by other counsel.

It is further claimed in effect by the applicants for the favor of this appeal that they had a "lien or equitable right" upon the fund, not obnoxious to section 3477—*i. e.*, an attorney's lien.

What is an attorney's lien?

(*a*) It is a lien on papers and documents received from his client and on money collected by him.

In re Paschal, 10 Wall., 483.

(*b*) It is a lien upon the decree or judgment obtained *by him for his client* to the extent the latter has agreed to pay him, or if there is no specific agreement for compensation to the extent to which he is entitled to recover on a *quantum meruit.*

Central R. R. vs. Pettus, 113 U. S., 116.

No judgment or decree has ever been obtained by McGowan or Brookshire for Parish in this case, so far as this record discloses. There was nothing adjudged by the Auditor. The Auditor was not empowered to render judgment.

The judgment upon which an attorney's lien is claimed was rendered in a suit instituted by other attorneys in the Supreme Court of the District of Columbia, finally adjudicated in this court, and in which no appearance was entered and no aid of any kind received from or proffered by the plaintiffs. McGowan is shown to have abandoned his client and his cause after the adverse decision of the Secretary of the Treasury, and the only judgment that was obtained was that rendered by this court through the services of other counsel. On what an attorney's lien had to fasten itself is not apparent. It was not the amount of the Auditor's finding, but the amount adjudged by the United States Supreme Court that was subsequently paid to Parish.

It was, however, said in the trial court: "But do the plaintiffs need to assert any lien by virtue of their written contracts?" (*i. e., has section* 3477 *any relevancy to the case?*) * * * "Treating the question, therefore, as affecting only the plaintiffs and the executrix, are not the plaintiffs entitled to a lien upon the fund, if they are entitled to anything, for professional services in producing the fund? Upon ordi-

In the case of *Am. Security Co. vs. District of Columbia,* upon the denial of a writ of error by this court, application was made to the Chief Justice of the Supreme Court and was referred by him to the court. The applicants claimed the warrant of the letter of the law. They said:

> "In this *the construction of the statutes was drawn in question by the defendants.*
>
> "The words 'any law of the United States' embrace the statutes the construction of which was *drawn in question in this case.*
>
> "The two acts of Congress, the construction of which was *drawn in question in this case,* are laws of the United States."

This court said:

> "We do not stop to consider whether any question of construction properly can be said to have been raised. * * * Some reasons for strict construction apply here. We are entirely convinced that Congress intended to effect a substantial relief to this court from indiscriminate appeals, where a sum above $5,000 was involved, and to that end repealed the former act. But all cases in the District arise under acts of Congress and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants the appellate jurisdiction of this court has been largely and irrationally increased. We believe Congress meant no such result" (224 U. S., 494-495).

If this was the decision of the United States Supreme Court in a case where the applicants were aided by the letter of the law, how much more should it be affirmed in an application where no such shelter can be claimed.

It is understood that applicants are about to file a petition for a certiorari. If there be any merit in the contention now made, it can be presented in the contemplated petition.

IV.

But the case was also decided on an independent ground, not involving a Federal question, and sufficient in itself to maintain the decree of the appellate court.

As indicated in the citations already made from the opinion of the Court of Appeals, it is not on section 3477 of the Revised Statutes that the defendant chiefly relied in her answer, or "in her appeal from the decree of the equity court chiefly based her defense, or on which the Court of Appeals chiefly based its conclusions." For in her answer the defendant says:

> "That by the said alleged contract of August 4th, 1900, between said Joseph W. Parish and J. H. McGowan, it is expressly stipulated and provided that the party of the second part (said McGowan) agrees to diligently prosecute said claim to the best of his professional ability to its *final determination*. This defendant is advised and insists, and so charges, that the consideration for the alleged agreement on the part of Parish was the promise by McGowan to prosecute said claim to its final determination. * * * Because said McGowan altogether ignored her wishes, interests, and duties, and silently abandoned the cause he had agreed to prosecute to 'final determination,' this defendant resorted to total strangers to take up an abandoned cause; one finally defeated by the judgment of the Secretary to whom by said act of February 17, 1903, it had been referred. Apparently said complainants agreed with the Secretary that discretion was given him to decide as he did. Certainly they took no step to assert, still less to demonstrate the contrary. Two years had passed, and only one year more remained for any step which could be taken for the assertion of any right which she possessed, when having received no advice, suggestion, or communication even, from said McGowan or said Brookshire, by the advice exclusively of others, she filed the petition for mandamus, which was rewarded finally with complete success" (Rec., p. 21).

In support of her contention the defendant called on the plaintiff's witness Serven to produce a letter written by her testator in September, 1904. Responding thereto the plaintiff's counsel produced, offered in evidence, and had marked Plaintiff's Exhibit M. and B. No. 13, the following (Rec., p. 85):

"COMMITTEE ON CLAIMS,
"HOUSE OF REPRESENTATIVES, U. S.,
"WASHINGTON, D. C., *Sept.* 15, 1904.

"Hon. J. H. McGOWAN.

"MY DEAR SIR AND FRIEND: Your letter of 25th ult. received in due time and contents noted, which I answered best I could, but have no answer thus far come to hand and will repeat in substance I wrote, to wit: You will remember before you left Washington for your summer respite, you said substantially 'that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury and failed, etc.; *that you turned over to me the case to be managed in the future and do whatever I deemed best, etc.*'

"Sometime next Congress I propose to organize a practicable method and resurrect the claim from its unfortunate condition and I must have unrestricted and unrestrained control. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one. Furthermore, I said that I would reimburse those who have advanced money to promote the case thus far and will do very much better for you than you expressed yourself to Mr. Brookshire, to wit, 'that you would be glad and well satisfied to get the money advanced me' returned. My past record as to compensation, who had rendered me service, you have not surely forgotten, which was generous, and as I remember very satisfactory to all concerned as living witnesses will testify. I am in the best of health and my time profitably employed in assisting an Illinois firm, who is doing business here and in New York.

"Yours hastily,

"J. W. PARISH,
217 *A St. S. E.*"

This letter was produced before the examiner by the partner of McGowan, who testifies that McGowan left Washing-

ton about the middle of July, 1904 (Rec., p. 84). It was then prior to this that McGowan used the language sought to be quoted with literal exactness by Parish. This letter of September 15, 1904, is stated to be the second letter written by Parish on the same subject. No reply having been received to the first, Parish "repeats in substance" in the second what had been written in the first, viz:

> "Before you left Washington for your summer respite (*i. e.*, before the middle of July, 1904), you said substantially that you had done your best to get Auditor's report in my case paid by the Secretary of the Treasury, *and failed, etc.; that you turned over to me the case to be managed in the future, and do whatever I deemed best* * * *. If an attorney is required after I get the matter advanced in Congress there will be no trouble to find one" (*Id.*, 85).

Through the medium of no form of words could abandonment be made more explicit. McGowan's partner says his best recollection is that this letter was delivered at his office, opened by himself, and forwarded to McGowan, with a request to the latter to say "what, if anything, he wanted done" (Rec., p. 87). To Parish McGowan made no reply; to Serven gave no instructions. McGowan was told by reason of his retirement from the case Parish would make new arrangements. If McGowan had contradiction to give, then was the time to give it. No contradiction of these statements has ever been received. The proof of abandonment is conclusive. "Where one party announces his intention not to fulfill the contract the other side may take him at his word and rescind the contract." *Roehm vs. Horst*, 178 U. S., 1-9, S. P.; *Leather, &c., Bank vs. Morgan*, 117 U. S., 112. Acquiescence is like permission to do the thing done, and equity would treat *as unconscionable the denial of that to which one has assented or acquiesced." Board vs. Plotner*, 149 Ind., 121.

In respect to this the Court of Appeals used the following language:

"This letter either recited the truth as to McGowan's surrender of the case or a deliberate falsehood. * * * The letter to McGowan, above recited, remained unanswered. If its recitals were true no reply was necessary; if untrue it should have been replied to promptly. The parties apparently met no more. * * * The executrix knew the former history of the claim, and that complainants were the attorneys engaged in it to the time of its failure in the Treasury Department, but she had no knowledge of the written contracts. No legal steps had been taken by complainants under the ample authority claimed in their letter of November 19, 1904, before mentioned, before the death of Parish. Knowing of his death and the qualification of defendant as his executrix they gave her no notice of their contracts and their readiness to proceed with performance with her consent. The counsel finally retained by her had no notice of complainants' contracts, and no offer of assistance was made to them. The executrix could readily have supposed from her father's letter to McGowan, and the latter's failure to reply thereto, that he had regarded the prospect for the collection of the claim, such as not worth further efforts on his part and was willing to let others undertake it. He said to McKee in December, 1904, that he did not care who collected it. That he also stated that he wanted his fee out of it is of no importance. He was entitled to no fee unless he prosecuted the case to a final determination. Nor was he entitled to have the reasonable value of his services before rendered without showing his willingness and readiness to proceed diligently, and the rejection of such tender by the executrix. The burden was upon the complainants to show this tender of their services, and there is no evidence of it."

From the foregoing it is shown that the case at bar was determined also on the ground of abandonment; that the plaintiffs contended there had been no abandonment; that the trial court sustained this contention, and that the Court of Appeals, for the reasons assigned in their opinion, came

to a contrary conclusion. The determination of the Court of Appeals in respect thereof is the final decree of the court of last resort on this contention.

Authorities.

"It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which ought to be independent of the Federal ones, determinative of the controversy. * * * The rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in *Eustis vs. Bolles*, 150 U. S., 361. It is sufficient to announce the rule pronounced in that case. * * *

"It is likewise *settled law* that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and *the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment*" (*Harrison vs. Morton*, 171 U. S., 46-47).

"Where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented."

Missouri, &c., R. R. vs. Fitzgerald, 160 U. S., 576.

"If, however, a Federal question was raised by the petition and on the appeal from the order denying it, the motion to dismiss must, nevertheless, be granted, because the decision of the Court of Appeals rests on grounds other than those dependent on Federal questions."

Chappell, &c., Co. vs. Sulphur, &c., Co., 172 U. S., 471.

"Whether the State court so interpreted the territorial statute as to deny such right to the plaintiffs in error we need not inquire, for it proceeded, *in part*, upon another and distinct ground, not involving any Federal question, *and sufficient in itself to maintain the judgment.*"

Beaupré vs. Noyes, 138 U. S., 401.

HOLMES CONRAD,
LEIGH ROBINSON,
For Emily E. Parish, Executrix.